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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REINAUER TRANSPORTATION COMPANIES, LLC,
REINAUER TRANSPORTATION COMPANIES, LP,
REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY,
LLC AND REINAUER MANAGEMENT COMPANY, INC.,

Petitioners,

v.

GEORGE BROWN,

Respondent.

On Petition For A Writ of Certiorari to the Court of Appeals of New York

PETITION FOR A WRIT OF CERTIORARI

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July 2, 2010

QUESTIONS PRESENTED

(1) Whether the Appellate Division of the Supreme Court of New York erred when it held, in conflict with decisions of this Court, that in a law suit brought pursuant to the Jones Act (46 U.S.C. § 30104 et. seq.), which incorporated unaltered the Federal Employers' Liability Act ("FELA") (45 U.S.C. § 51 et seq.) and permits an employee to recover damages for injuries "resulting in whole or in part from the negligence" of the employer, a jury instruction employing the language of proximate cause is inappropriate and that instead the jury must be instructed that the employer is liable for damages if its negligence played any part, even the slightest, in causing the damages, thereby holding the common law requirement that a plaintiff prove proximate cause is not the standard in cases brought pursuant to the Jones Act and/or the FELA and that damages are to be awarded pursuant to a relaxed "even the slightest" standard which is not set forth in either the FELA or the Jones Act?

(2) Whether the Appellate Division of the Supreme Court of New York erred when it affirmed the lower court's finding that the shipowner was negligent *per se* under the Jones Act and dismissed its defense of contributory negligence based upon a summary pre-trial finding that the shipowner violated inapplicable American National Safety Institute ("ANSI") standards purporting to establish the factual predicate for the lower courts' finding that a Coast Guard general safety regulation, which embodied no standards for compliance other than

"satisfactory means," thereby permitting the inapplicable ANSI standards to be substituted for what was promulgated and intended by the Coast Guard resulting in a liability finding against the shipowner and dismissal of the defense of contributory negligence aithough there was no evidence or finding that any particular requirement of the Coast Guard was violated by the shipowner, or that the Coast Guard ever intended its general safety regulation to serve as the basis for a finding of negligence *per se* thereby stripping the shipowner of the defense of contributory neglience?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that all parties to the proceedings in the court whose judgment is sought to be reviewed are contained in the caption of the case.

RULE 29.6 STATEMENT

Petitioners Reinauer Transportation Companies, LLC, Reinauer Transportation Companies, LP, Reinauer Companies, Inc., Reinauer Maritime Company, LLC and Reinauer Management Company, Inc. (collectively "petitioner" or "Reinauer") are not owned or affiliated with a company which is publicly traded. No publicly-held company owns more than 10% of petitioners' stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Reinauer respectfully petitions for a writ of certiorari to review the judgment of the Appellate Division, Third Department, of the Supreme Court of New York.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion of the Appellate Division affirming the judgment of the trial court is reported at 67 A.D.3d 106 (3d Dept. 2009) and is reproduced in the Petition Appendix ("Pet. App.") 8a-21a. The order of the Court of Appeals of the State of New York denying a motion for leave to appeal is unreported, but is available at 2010 N.Y. LEXIS 416 (April 6, 2010), and is reproduced at Pet. App. 1a-4a.

JURISDICTION

The judgment of the Appellate Division was entered on October 8, 2008. Pet. App. 46a-49a. The Court of Appeals denied the motion for leave to appeal on April 6, 2010. Pet. App. 1a-4a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

The statutes involved are the Jones Act (46 U.S.C.S. § 30104 et. seq.) and Federal Employer's Liability Act ("FELA"), (45 U.S.C.S. §§ 51 et. seq.). The Jones Act provides, in relevant part:

> A seaman injured in the course of his employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to . . . a railway employee apply to an action under this section.

The FELA provides, in relevant part:

> Every common carrier by railroad . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence. . . . (45 U.S.C.S. § 51).

The relevant instructions provided to the jury are reproduced at Pet. App. 148a-191a.

STATEMENT OF THE CASE

The FELA, which was incorporated "unaltered"[1] into The Jones Act, authorizes a railroad employee to recover damages for a workplace injury "resulting in whole or in part from the negligence" of the employer with damages reduced in proportion to contributory negligence, if any, on the part of the employee (45 U.S.C. § 53). By this petition, Reinauer asks the Court to review the holding of the

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[1] *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

court below, which is in conflict with this Court's precedents and decisions of multiple other courts, eliminating as a prerequisite for a finding of liability *and damages* the common law requirement of proximate cause. The court below misinterpreted this Court's decision in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957) in holding that proximate cause is not the standard of causation for liability for damages in an action brought under the Jones Act. Although clearly established in the common law that an employer could only be held liable for damages if the plaintiff-employee proved proximate cause, the issue of what standard is required to establish causation in FELA/Jones Act cases has been problematic since *Rogers* and there currently exists a marked conflict among lower courts, as demonstrated by the decisions of the lower court in the instant case, as to whether an employer's liability for damages, FELA requires proof of proximate cause. This conflict has caused the non-uniform application of federal law in suits for injuries brought by seaman and railroad workers against their employers.

This Court did not hold in *Rogers* that a lesser standard of causation was applicable in FELA cases, nor did it eliminate the common law requirement that an employer's liability for damages be proven by the proximate cause standard. Indeed, in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), this Court held: "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law"

and ". . . common-law principles . . . unless they are expressly rejected in the text of the [FELA] . . . are entitled to great weight" in analyzing applicable standards under the FELA.[2] The FELA did not expressly reject the common law requirement that a plaintiff prove his or her damages were proximately caused by the employer's negligence, and the "in whole or in part" language of the FELA cannot be read as having done so. Indeed, Justice Souter's concurring opinion in *Sorrell*, joined by Justices Scalia and Alito, stated the "in whole or in part" language of FELA did not in any way relax or eliminate the common law negligence element of proximate cause, but was included in the statute to permit recovery where there was more than one cause of an injury. The concurrence also noted there was a conflict among lower courts as to whether FELA requires a showing of proximate causation. (549 U.S. at 173 and n. * (Souter, J., concurring)). The concurring opinion made clear that: proximate causation was required at common law prior to enactment of FELA; the FELA did not expressly abrogate that requirement; in a series of cases beginning shortly after FELA was enacted this

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[2] *See also*, *Urie v. Thompson*, 337 U.S. 163, 174 (1949) ("[FELA] does not define negligence, leaving that question to be determined . . . by the common law principles as established and applied in the federal courts . . . What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes. Federal decision law formulating and applying the concept governs.")

Court repeatedly held that plaintiff was required to prove proximate cause in actions under FELA;[3] and in *Rogers* this Court did not adopt a different rule. (549 U.S. at 173-77, Souter, J. concurring)). Justice Ginsburg, in a separate concurring opinion, stated that a relaxed standard of causation applied in FELA cases, holding *Rogers* in fact served to describe and set the standard for proximate cause in FELA cases as ". . . even the slightest, in producing the injury or death for which damages are sought." (549 U.S. at 178, Ginsburg, J. concurring).

The central question which makes this petition worthy of certiorari is whether Congress in enacting the FELA abandoned the common law requirement that a plaintiff prove the employer's negligence proximately caused liability *and* damages. Based upon a misinterpretation of *Rogers*, the courts below eliminated the requirement for plaintiff to prove liability for damages by the proximate cause standard. The trial court, in the damages-only trial, refused to instruct the jury that plaintiff was entitled to recover only those damages proximately caused by Reinauer's negligence and the Appellate Division affirmed, holding: "a charge employing the language of proximate causation is inappropriate in the context of a Jones Act case, in which an employer is liable for damages if its 'negligence played any part, even the slightest, in producing

[3] *See, e.g., Norfolk & W. Ry. v. Earnest*, 229 U.S. 114, 118-120 (1913); *St. Louis, Iron Mountain & S. Ry. v. McWhirter*, 229 U.S. 265, 280 (1913).

the injury or death for which damages are sought.'" Pet. App. 19a.

This Court should also consider this case worthy of certiorari to address the question of what standard applies to the substantive elements of a FELA/Jones Act negligence claim. It is submitted the Court should hold that FELA requires proximate causation to establish *liability* and *damages*. The recurring issue of whether the common law standard of proximate cause was eliminated in suits brought under the FELA and the Jones Act has been inconsistently decided by lower courts with the result that these federal statutes which have significant impact upon two vital industries – the railway industry and the maritime industry – have not been uniformly applied.

A. Statutory Background

The FELA was enacted in 1908 and pre-empted state law tort remedies in favor of a unified federal scheme for cases involving railroad workplace injuries. *See Sorrell*, 549 U.S. at 166. The legislative history of the FELA clearly indicates the objectives to be achieved by the original bill, the Senate Report listing four principal goals:

> First: It amends the law as to the liability of employers for injuries sustained by one employee through the negligence of a coemployee. This doctrine of fellow-servants is very old and possibly had sound reason to support it before the occupations of men became complex and diversified. . . .

> Second: It proposes to set aside the earlier rule of law which presumes that a workman have notice of and assume the risks incident to all dangers of his employment and defects in the machinery with which he works.
>
> Third: It is the purpose of this measure to modify the law of contributory negligence. . . .
>
> Fourth: It contains a section affecting contracts made by a workman limiting or relieving the employer's liability for negligence.

S.Rep. No. 460, 60th Cong., 1st Session 1-3 (1908).

The Report states that the purpose of the legislation is not to "add burdens to the business enterprise of the country, but rather to promote the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to . . . those who . . . ought to share the burden." *Id.* at 4. The House Report cites similar goals. *See* H.R.Rep. No. 1386, 60th Cong., 1st Session 1-3 (1908). *See also*, S.Rep. No. 661, 76th Cong., 1st Session (1939).

Although the FELA was a departure from the common-law rules concerning the fellow servant rule, assumption of the risk, and contributory negligence, the substantive elements of an FELA (and hence Jones Act) claim, i.e., "(1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury," (*Sorrell*, 549 U.S. at 169), are defined by common-law principles,

since not expressly modified by the statute. *See Urie v. Thompson,* 337 U.S. 54 (1943); *Consol. R. Corp. v. Gottshall,* 512 U.S. 532, 543-44 (1994).

The Jones Act, enacted in 1920, created a negligence cause of action for ship personnel against their employers and incorporated the "[l]aws of the United States regulating recovery for personal injury to, or death of, a railway employee" and is guided by law developed under the FELA. *See Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539 (1960); *Puthe v. Exxon Shipping Co.,* 802 F. Supp. 819, 824 (E.D.N.Y. 1992); *California Home Brands, Inc. v. Ferreira,* 871 F.2d 830, 833 (9th Cir.1989); *Gabourel v. Bouchard Transp. Co., Inc.,* 901 F.Supp. 142 (S.D.N.Y. 1995). Neither the FELA nor the Jones Act is a workers' compensation statute and both require an injured employee to prove employer's negligence pursuant to common-law negligence principles. *See Urie v. Thompson.* 337 U.S. 54 (1943); *Consol. R. Corp. v. Gottshall,* 512 U.S. 532, 543-44 (1994).

B. Factual Background

Reinauer seeks review of the Order and Opinion of the Appellate Division of the Supreme Court for the State of New York which affirmed a $5,299,210.21 Ulster County Supreme Court judgment. Pet. App. 8a-22a. This is a seaman's personal injury suit brought pursuant to the Jones Act as a result Plaintiff-Respondent George Brown's ("Brown") July 21, 2003 fall from the deckhouse roof of Reinauer's unmanned petroleum barge RTC 502.

Brown, captain of RTC 502, claimed he fell from the roof of the aft deckhouse to main deck when a makeshift antenna separated from its base after he grabbed it while descending from the roof via a welded single rung steel ladder. Pet. App. 27a-28a. Brown's liability expert David E. Cole ("Cole") claimed the antenna pole was used as the ladder's "*de facto* hand rail" although it was not part of the ladder itself, nor was it designed to be used as a handrail. Pet. App. 70a.

Brown moved for partial summary judgment seeking an order finding Reinauer negligent *per se* and dismissing the defense of comparative negligence arguing Reinauer violated Coast Guard Load Line Convention,[4] Subchapter E Rules and Regulations 46 CFR § 42.15-75(d) "Protection of the crew" which provides as follows:

> Satisfactory means (in the form of guard rails, lifelines, gangway or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel.

The substance of Brown's motion was based largely upon Cole's affidavit in which he asserted the steel rung ladder aboard RTC 502 did not provide "satisfactory means" of access and thus violat-

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[4] Promulgated under the International Voyage Load Line Act of 1973, as amended 46 U.S.C. 5101-5116 (the "Load Line Act").

ed Coast Guard regulation 46 CFR § 42.15-75(d) because its design violated inapplicable ANSI standards, even though RTC 502 carried a valid Certificate of Inspection from the Coast Guard. Pet. App. 65a-70a. The motion court rejected Reinauer's argument that ANSI standards could not provide the basis for a finding of negligence *per se* in a Jones Act case and held Cole properly utilized the inapplicable ANSI standards to establish the "factual predicate" for his conclusion that the standard-less Coast Guard regulation had been violated, which the court accepted in toto in granting Brown's motion for partial summary judgment on the theory of negligence *per se*. Pet. App. 31a. The Appellate Division affirmed, holding the concededly inapplicable ANSI standards were "relevant to [Cole's] determination of whether the ladder provided "'satisfactory means' of access. . ." pursuant to 46 CFR § 42.15-75(d), inconsistently acknowledging ANSI standards could not provide the basis for a finding of negligence *per se*. Pet. App. 14a, n. 1. Since 46 C.F.R. § 42,15-75(d) contains no standards aside from "satisfactory means," the grant of partial summary judgment on the theory of negligence *per se* was necessarily premised upon the lower courts' application of the admittedly inapplicable ANSI standards in assessing whether Reinauer violated 46 C.F.R. § 42.15-75(d). The result was Reinauer's defense to plaintiff's claim for negligence was dismissed, as was the affirmative defense of contributory negligence, because of an alleged ANSI violation, even though the court conceded the ANSI standards did not apply. This erro-

neous grant of partial summary judgment based upon the application of ANSI standards served to excuse Brown of his burden of proving liability under the Jones Act and deprived Reinauer of its statutory defenses, while serving to expand the liability of Reinauer as a Jones Act shipowner beyond that permitted under the Jones Act and cases decided thereunder.

At the ensuing damages-only trial, the central issue was whether or not lower extremity pain symptoms Brown claimed were disabling were caused by peripheral poly-neuropathy brought on by unrelated causes, including Brown's alcoholism and/or diabetes, or post-traumatic reflex sympathetic disorder ("RSD") which allegedly first became manifest eight months after the accident and three and a half months *after* Brown returned to work following his accident and surgical repair for fracture of the right hip and physiotherapy for a chip fracture of the right elbow, which were caused by his fall. While Reinauer did not contest that Brown fractured his hip and elbow in the fall aboard Reinauer's vessel, at trial it presented evidence establishing that both orthopedic injuries went on to heal and that neither were disabling. Brown sought damages to compensate him for alleged total permanent disability caused by pain symptoms which he claimed were attributable to RSD brought on by the accident. This claim was hotly disputed at trial by Reinauer, which introduced evidence establishing that Brown suffered from peripheral poly-neuropathy in his lower extremities caused not by trauma but by unrelated natural causes including

alcoholism and/or diabetes. Pet. App. 115a-117a. Although Reinauer could not be properly held liable for damages caused by poly-neuropathy brought on by Brown's long term alcoholism and/or diabetes, the trial court's charge, given over Reinauer's objection and based upon the flawed premise that *Rogers* had eliminated the proximate cause requirement in cases brought under the FELA/ Jones Act, *required* the jury to award Brown damages even if it determined Brown's pain symptoms resulted from "some natural cause" in the event an injury caused by Reinauer's negligence, which the trial court instructed the jury had been "already . . . determined" "played any part, even the slightest" in causing Brown's damages. Pet. App. 140a.

The erroneous jury instruction eviscerated Reinauer's defense that Brown's disabling lower extremity pain complaints following his return to work after repair of his hip fracture were explained by his peripheral poly-neuropathy caused by his alcoholism and/or diabetes for which it could not be held liable, and not traumatically-induced RSD[5] for

[5] At trial, Reinauer established plaintiff had neuropathy, caused by diabetes and/or alcoholism and in light of the trial evidence, requested the following charge: "To award any damages for an injury consequence . . . you must find there is a direct and unbroken chain of causation between the injury and the consequence alleged, including RSD, exists and was caused either by hip injury or hip surgery. But you must also determine that his pain and disability, if he has any, is not the result of any other condition, such as peripheral neuropathy caused by alcohol abuse or diabetes; or inappropriate use of narcotic pain medications. For an injury to be the cause of an alleged consequence there must be an unbroken chain of con-

which it would be. Eliminating the common law proximate cause requirement and instructing the jury that Brown was to recover damages if it determined Reinauer's negligence was "even the slightest" cause and even if whatever damages were caused by Reinauer's negligence combined with natural occurring conditions to disable Brown, resulted in the jury being compelled to award Brown the damages he claimed even if it found that Reinauer's negligence did not proximately cause Brown to be totally disabled due to pain, so long as it found that Reinauer's negligence combined even slightly with naturally, non-traumatically caused conditions to cause Brown's allegedly disabling pain. Brown's attorney's summation exploited the erroneous jury charge serving to eliminate the common law proximate cause requirement by arguing to the jury "the only thing you have to decide in this case" is whether "George was in pain [ ] that's all you have to decide." Pet. App. 126a-127a. Indeed, by such argument Brown's attorney clearly articulated the obvious import of the error of the court's charge: that Brown was relieved of the burden of proving Reinauer's negligence proximately caused him to suffer the damages he claimed at trial. In fact, the erroneous instruction compelled a verdict in favor of Brown without requiring the jury to determine what injuries he sustained as a result of Reinauer's negligence.

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nection between the consequence and the injuries which you find plaintiff actually sustained." Pet. App. 181a.

The jury returned a verdict awarding Brown $257,452 for past loss of earnings, $1,000,000 for past pain and suffering, $400,000 for future medical expenses, $896,190 for future loss of earnings, $2,500,000 for future pain and suffering, and past medical expenses, the amount of which was reserved by stipulation. Pet. App. 48a. Judgment against Reinauer was entered in the sum of $5,299,210.21. Pet. App. 48a.

C. Jury Instructions

Brown's proposed jury instructions were based upon the misreading of *Rogers* which has been interpreted as having eliminated the common law requirement of proximate cause. Brown requested the jury be instructed:

> To establish causation the plaintiff must show that the fall and/or the care and treatment related thereto played any part, even the slightest, in bringing about an injury to the plaintiff. However, it is important to remember that there can be more than one cause of an injury. The involvement of any other cause does not prevent a finding for the plaintiff, as long as you find that the fall, or the consequences of the fall and/or the care and treatment related thereto play any part, no matter how slight, in causing an injury to the plaintiff." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506 (1957).

Pet. App. 151a.

Reinauer submitted objections and its own proposed instructions which incorporated common law proximate cause principles and requested the jury be charged that to award damages ". . . plaintiff must establish the period he was disabled by the injuries he *actually sustained* July 21, 2003" and only if it found ". . .a direct and unbroken chain of causation between the injury and the consequence alleged . . . ." Pet. App. 170a-171a. Reinauer's proposed instructions asked that the jury be charged that it:

> [M]ust also determine that [plaintiff's] pain and disability, if he has any, is not the result of any other condition, such as peripheral neuropathy caused by alcohol abuse or diabetes; or by inappropriate use of narcotic pain medications. For an injury to be the cause of an alleged consequence there must be an unbroken chain of connection between the consequence and the injuries which you find plaintiff actually sustained. You are not to award damages for any injury or condition from which plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question.

Pet. App. 170a-171a.

In "Defendant's Additional Proposed Jury Charges" Reinauer reiterated its objection to the "even in the slightest" charge did not apply to dam-

ages. Pet. App. 188a-189a. Before the jury was charged and prior to deliberations Reinauer timely objected to the charge prepared by the court based upon Brown's proposed jury instructions which were premised upon the mis-reading of *Rogers* as eliminating the common law element of proximate cause in a Jones Act/FELA law suit. Pet. App. 114a-119a, 121a-122a. Reinauer's counsel cautioned the charge was "simply wrong . . . and in my opinion reversible error." Pet. App. 117a-118a. The court denied defendant's objections.[6] Pet. App. 119a.

The trial court charged the jury:

> It has already been determined the plaintiff suffered injuries as a result of the defendant's negligence. You must, therefore, decide whether or not such negligence caused in whole or in part any injury or damages suffered by the plaintiff. Negli-

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[6] Reinauer's objections preserved for appellate review the erroneous jury instructions. See *New York's Civil Practice Law and Rules* ("CPLR") § 4110-b (A party may not "assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection"); CPLR § 4017 ("[f]ormal exceptions to rulings of the court are unnecessary" and a party must simply ". . . make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court") and CPLR § 5501(a)(3) (a party preserves for appeal ". . . any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected").

> gence may cause damage or injury even if it operates in combination with the act of another or some natural cause so long as the negligence played any part, even the slightest, in causing damage or injury.

Pet. App. 138a-140a.

Reinauer renewed its objections to the charge after the jury was charged and before deliberations commenced. 146a-147a.

REASONS FOR GRANTING THE PETITION (ARGUMENT)

The instruction given to the jury eliminated the common law requirement that a plaintiff in an FELA/Jones Act case prove that his employer's negligence proximately caused him the damages claimed. *See, e.g., Mosley v. Cia. Mar. Adra, S. A.*, 314 F.2d 223, 228 (2d Cir. 1963)(". . . there must be a direct causal connection between the . . . negligence and the injury. In other words, there must be an unbroken chain of events flowing from the . . . negligence and leading to the injury.")

The court's erroneous instruction eliminating the requirement that a FELA/Jones Act plaintiff prove proximate cause resulted in harmful error to Reinauer since its defense at the damages-only trial was premised upon establishing that its negligence, as found by the court's erroneous order granting partial summary judgment on the basis of inapplicable ANSI standards, *was not* the proxi-

mate cause of pain claimed by Brown, and that other unrelated naturally caused conditions were the cause of Brown's allegedly disabling lower extremity pain, which formed the basis for Brown's claim for damages compensating him for his alleged permanent and total disability, as well as for alleged life-long pain and suffering. In rejecting the instruction requested by Reinauer, which properly set forth that damages could only be awarded if the jury found them to have been proximately caused by Reinauer's negligence, in favor of *Rogers*-based instruction employing the "even the slightest" language to establish liability for damages, the court below repeated and compounded the error of other courts that have interpreted FELA and the Jones Act to require only a relaxed standard of causation, contrary to the express wording of the FELA and what appears to have been intended by the "in whole or in part" language of that statute. That this issue merits certiorari to this Court is supported by the fact, as was amply identified by Justice Souter's concurring opinion in *Sorrell*, that lower courts are divided over the standard for proving causation in a negligence action brought under FELA and the Jones Act. Indeed, reflecting the disagreeing concurring opinions authored by Justice Souter and Justice Ginsburg in *Sorrell* confusion amongst lower courts since that decision has continued on this important issue.

A. Lower courts are divided over the proper interpretation of *Rogers* as this case clearly demonstrates

1. Cases holding FELA/Jones Act requires proximate cause

As Justice Souter observed in his *Sorrell* concurrence, lower courts are divided on whether Rogers "smuggled proximate cause out of . . . FELA." 549 U.S. at 173 n.* Since *Sorrell* that division has widened. Utah's Supreme Court held in *Raab v. Utah Railway Company*, 2009 UT 61, 639 Utah Adv. Rep. 17, 2009 Utah LEXIS 188 (Utah Supreme Ct. September 18, 2009) – consistent with the rationale set forth in Justice Souter's concurrence in *Sorrell* – FELA did *not* establish a relaxed standard of causation of liability, and that the decision of *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957) did not in any way alter the common law standard of causation in FELA/Jones Act cases, which requires plaintiff establish a defendant's negligence proximately caused the accident or event claimed to give rise to liability. The court in *Raab* held:

> Because there is nothing in the text of FELA that expressly alters the standard common law requirement that a negligence plaintiff prove proximate cause, reading *Rogers's* ambiguous language as eliminating the proximate cause requirement would be contrary to the Supreme Court's approach to FELA. We decline to assume, in light of the

> ambiguous language and another more plausible and consistent interpretation, that the Supreme Court violated its own interpretive rules in *Rogers*. Instead, we conclude that the Supreme Court, in *Rogers*, spoke only to the point that contributory negligence was unavailable as a defense in FELA negligence actions.

As the court in *Raab* noted, the issue is a matter of unsettled federal law, stating ". . .even among the members of the Supreme Court, it appears that there is no definitive view of *Rogers's* impact" upon the issue of the whether the FELA/Jones Act imposed a lesser standard of causation than proximate cause, requiring the court in *Raab* to analyze and resolve the issue. *Raab v. Utah Ry. Co.*, 2009 UT 61, P31 (Utah 2009).[7]

Other state supreme courts had held the same, even before *Sorrell*. *See, e.g., Marazzato v. Burlington N. R.R. Co.*, 817 P.2d 672, 675 (Mont. 1991) ("The plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("a plaintiff employee must establish that the defendant employer acted negligently and that

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[7] *See also, Mills v. CSX Transp., Inc.*, 2009 Tenn. LEXIS 822 *15, fn. 4 (Supreme Ct. Tenn. Dec. 7, 2009) ("It is not entirely clear which standard of causation *Rogers* applies to FELA cases--the common law standard or a relaxed standard (citing competing concurrences from *Sorrell*.))

such negligence contributed proximately, in whole or in part, to plaintiff's injury"); *Snipes v. Chicago Central & Pacific R. Co.*, 484 N.W.2d 162 (Iowa 1992) ("Recovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident"); *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 627, 467 N.W.2d 388, 395 (1991) ("To recover under [FELA], an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury").

Further, at least two federal district courts have adopted the rationale articulated in Justice Souter's concurrence in *Sorrell* to conclude that the FELA (and hence the Jones Act) did *not* relax the standard of causation or eliminate the requirement of proximate case. *See Lafferty v. Norfolk S. Ry. Co.*, 2009 U.S. Dist. LEXIS 106442, 10-11 (N.D. Ohio Nov. 12, 2009) ("Though there is some dispute as to whether traditional proximate cause concepts can be reconciled with the holding of *Coray [v. Southern Pacific Co.*, 335 U.S. 520 (1949)], that the violation need only be a "contributory" cause of the FELA plaintiff's injury, Justice Souter's persuasive concurring opinion in *Norfolk Southern R. Co. v. Sorrell*, . . . indicates that proximate cause remains an element in FELA/SAA suits"); *Jarrett v. CSX Transp. Inc.*, 208 U.S. Dist. LEXIS 86256 (N.D. Ohio September 10, 2008) ("The proximate cause standard for an employee's motion for summary

judgment was not modified by *Rogers*, and remains the traditional common law standard").

2. Cases holding *Rogers* eliminated proximate causation in FELA/Jones Act cases

Acknowledging the split in the lower courts, an intermediate appeals court in Tennessee, considering the issue after *Sorrell*, said "there is a split of authority regarding the Supreme Court's use of the phrase 'even the slightest' in *Rogers*, and we decline to hold that the trial court's instruction [incorporating that language] was improper based upon one of two conflicting concurring opinions in *Sorrell*." *Jordan v. Burlington N. Santa Fe. R.R. Co.*, 2009 Tenn. App. LEXIS 8, 46-48 (Tenn. Ct. App. Jan. 15, 2009); *cert denied* ___ U.S. ___, 2010 U.S. LEXIS 3472 (U.S., Apr. 19, 2010).[8]

Several federal courts have held in the wake of *Sorrell*, contrary to *Raab* and others, that the common law requirement of proximate cause was eliminated as result of the decision in *Rogers* in FELA/Jones Act cases. In *McBride v. CSX Transp., Inc.*, 598 F.3d 388 (2010), the Seventh Circuit Court of Appeals "decline[d] to hold that, in light of the Supreme Court's opinion in *Sorrell*, common-law proximate causation is required to establish liability under the FELA." In *McBride* the jury was

[8] The trial court in *Jordan* gave a form of proximate cause instruction to the jury, which although objected to by the railroad as to its content, seemingly did not squarely frame the issue for review by the Court upon the railroad's petition for certiorari.

instructed: "Defendant 'caused or contributed to' plaintiff's injury if defendant's negligence played a part—no matter how small—in bringing about the injury." The Seventh Circuit held that instruction "simply paraphrase[d] the Supreme Court's own words in *Rogers* and, therefore, correctly state[d] the law as the Supreme Court has articulated it up to now." *McBride*, 598 F.3d at 406 (citing *Rogers*, 352 U.S. at 506).[9]

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[9] *See also*, *Johnson v. Cenac Towing Inc.*, 544 F.3d 296, 302 (5th Cir. La. 2008) (holding the standard of causation in Jones Act cases is not demanding and was satisfied by a showing that negligence played any part, even the slightest, in causing injury, while noting the contrary concurring opinion of Justice Souter in *Sorrell*); *Jackson v. A-C Prod Liab. Trust*, 622 F.Supp.2d 641, 649-650 (N.D. Ohio 2009) ("Defendant's reliance on *Norfolk Southern Railway v. Sorrell*, . . . centers on the concurrence of Justice Souter where he and Justices Scalia and Alito opined there was no "relaxed" causation standard in FELA (and by implication Jones Act) cases. The majority holding in *Sorrell* did not go that far. Therefore, until such time as the Sixth Circuit or Supreme Court either change or clarify the standard, the Court believes the instruction as given was accurate"); *Medwig v. Long Island R.R.*, 2007 U.S. Dist. LEXIS 42001 (S.D.N.Y. 2007) (*Sorrell* did not clearly establish a majority of the justices would do away with the relaxed standard of causation and ". . . a district court in this Circuit is bound by such decisions unless and until they have been overruled by the Supreme Court or the law is otherwise changed"); *Marzoll v. Marine Harvest US, Inc.*, 2009 U.S.Dist. LEXIS 120270, *120, fn. 75 (D.Me. Nov. 29, 2009); *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 52 (S.C. 2008) ("Although Justice Souter's concurring opinion in *Sorrell* has now clouded the issue on whether *Rogers* indeed relaxed the causation standard, the majority opinion did not speak to this precise issue. We therefore agree with Justice Ginsburg's assessment that *Sorrell* leaves both *Rogers* and *Gottshall* intact.")

3. Several courts have expressed confusion as to the substantive standard under the FELA/Jones Act

Other courts have expressed confusion as to the substantive law on the issue of causation in the aftermath of *Sorrell*. *See, e.g., McNeel v. Union Pac. R.R.*, 276 Neb. 143, 150 (Neb. 2008) ("The existence of a 'relaxed standard' for proving causation in FELA cases was called into question by the U.S. Supreme Court's decision in . . . *Sorrell* . . . Although the Court held that the causation standard for negligence and contributory negligence under FELA is the same, it did not articulate what the proper standard should be inasmuch as it did not grant certiorari on that issue"); *Hall v. Norfolk S. Ry. Co.*, 2007 U.S. Dist. LEXIS 69630 (N.D.Ga. Sept. 18, 2007) ("With respect to a standard of causation, the Supreme Court continues to debate the precise contours of its holding in *Rogers*."); *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 634 (Tenn. 2009) ("It is not entirely clear which standard of causation *Rogers* applies to FELA cases—the common law standard or a relaxed standard"); *In re Global Santa Fe Corp.*, 275 S.W.3d 477 (Tex. 2008).

In this case, the Appellate Division affirmed application of the relaxed standard of causation citing to *Rogers*. In doing so, the court extended this relaxed standard to FELA/Jones Act cases brought in New York state courts, where the issue had not been previously decided, and applied it to reduce plaintiff's common law burden of proving damages. Indeed, not only has the confusion as to the sub-

stantive standard of causation as a result of the decision in *Rogers* been applied to the issue of liability, i.e. whether the employer's negligence cause an injury, but to the issue of damages as well, creating yet further confusion and a split of authority, as well as departure from common law standards not contained within the text of the FELA/Jones Act. *See Marchica v Long Island R.R.*, 31 F.3d 1197 (2d Cir. 1994) (While a plaintiff generally may only recover for damages proximately caused by a defendant's breach of duty, "in the FELA context the traditional concept of proximate cause is supplanted by the less stringent standard that there be some causal relations, no matter how slight, between the injury and the railroad's breach of duty"); *but see Mosley v. Cia. Mar. Adra, S. A.*, 314 F.2d 223, 228 (2d Cir. 1963) ("We recently approved an instruction that proximate cause requires 'an unbroken chain of events flowing from the unseaworthiness or negligence and leading to the injury.'"); *Wharf v. Burlington N. R.R.*, 60 F.3d 631, 639 (9th Cir. Wash. 1995) (Plaintiff in FELA case must prove damages were proximately caused by defendant's negligence); *Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 540 (5th Cir. La. 1987) (In a Jones Act case, proximately caused damages may be awarded); *Baker v. Baltimore & O. R. Co.*, 502 F.2d 638, 644 (6th Cir. Ohio 1974).

The fact that there is a split of authority among the lower courts over whether a departure from the proximate cause standard is authorized by FELA/Jones Act creates uncertainty for litigants and

encourages forum shopping, making this issue suitable at this time for consideration by this Court. The Court in *Sorrell*, in declining to resolve this issue on which certiorari had not been granted, noted ". . . the issue of the substantive content of the causation standard is significant enough that we prefer not to address it when it has not been fully presented." 549 U.S. at 164. Reinauer submits that the issue of the substantive content of causation in FELA/Jones Act cases merits the granting of the certiorari in this case so uniformity in the application of the federal statutory law embodied under the FELA/Jones Act can be restored. *See Morange v. States Marine Lines*, 398 U.S. 375, 402 (1970) ("Federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country'"); *see also Urie v. Thompson*, 337 U.S. at 174 (1949).

B. FELA requires proximate cause

The substantive elements of an FELA claim are determined "by reference to the common law" unless the statute contains "express language to the contrary." *Sorrell,* 549 U.S. at 165-66. It has been frequently stated that when Congress abrogated common law rules in FELA, it did so expressly. *Norfolk & Western R. Co.* v. *Ayers*, 538 U.S. 135, 145 (2003); *Consol. R. Corp. v. Gottshall,* 512 U.S. 532 (1994); see also *Second Employers' Liability Cases*, 223 U.S. 1, 49-50 (1912) (cataloguing FELA's departures from the common law). In enacting FELA, Congress expressly altered the common law only to the extent that it ". . . abolished

the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, and prohibited employers from exempting themselves from FELA through contract ..." *Gottshall*, 512 U.S. at 543; *Sorrell*, 549 U.S. at 168. Although in enacting FELA the common law rule of contributory negligence as a complete bar to recovery was abandoned in favor of comparative negligence, the statute did not address in any way the common law proximate cause standard in negligence actions. Prior to and since enactment of the FELA it has been the rule that "plaintiff [must] prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." *Id.* at 173 (Souter, J., joined by Scalia and Alito, JJ., concurring). This Court has repeatedly "recognized and applied proximate cause as the proper standard in FELA suits." *Id.*

The Appellate Division, however, mistakenly held that *Rogers* eliminated in FELA cases the common law proximate law standard holding "a charge employing the language of proximate causation is *inappropriate* in the context of a Jones Act case, in which an employer is liable for damages if its 'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" (emphasis added). Pet. App. 19a. Yet *Rogers* did not reject the common-law requirement of proximate cause. In *Rogers* the jury was instructed that it *must find* proximate cause in order to find defendant liable, 352 U.S. at 520, 523 (1957), and the Court referred to its prior decisions recognizing

that FELA requires that the defendant's negligence must have been a "contributory proximate cause" in order for plaintiff to recover. *Id.* at 506, n.11 (citing *Coray v. S. Pac. Co.*, 335 U.S. 520, 523 (1949); *id.* at 507, n13 (citing *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 435 (1949). What *Rogers* recognized is that in a case brought pursuant to the FELA, as is established by its "in whole or in part" language, there can be more than one cause of an injury and defendant's negligence need not be the sole proximate cause, so long as it is *a* proximate cause.[10]

[10] Examining the inclusion of this language in historical context provides insight into its meaning. Prior to the enactment of the FELA, courts used the phrase "in whole or in part" to refer to multiple causation in common law negligence actions in order to clarify that an injury could have more than one proximate cause, not to lower the causation standard. *See e.g., Southern Ry. v. Howell*, 34 So. 6, 10 (Ala. 1903); *Gila Valley Globe & N. Ry. v. Lyon*, 80 P. 337, 340 (Ariz. 1905), *aff'd*, 203 U.S. 465 (1906); *St. Louis Iron Mountain & S. Ry. v. Coolidge*, 83 S.W. 333, 334 (Ark. 1904); *Schneider v. Market St. Ry.*, 66 P. 734, 736 (Cal. 1901); *Denver & Rio Grande R.R. v. Peterson*, 69 P. 578, 579 (Colo. 1902); *Park v. O'Brien*, 23 Conn. 339, 1854 WL 818, at *5 (1854); *Jacksonville St. Ry. v. Chappell*, 21 Fla. 175, 1885 WL 1758, at *6 (1885); *New York Chi. & St. Louis R.R. v. Periguey*, 37 N.E. 976, 977 (Ind. 1894); *Rietveld v. Wabash R.R.*, 105 N.W. 515, 517 (Iowa 1906); *Louisville & Evansville Mail Co. v. Barnes' Adm'r*, 79 S.W. 261, 262 (Ky. 1904); *Guthrie v. Maine Cent.* R.R., 18 A. 295, 296 (Me. 1889); *Paquin v. Wisconsin Cent. Ry.*, 108 N.W. 882, 883 (Minn. 1906); *Memphis & Charleston R.R. v. Jobe*, 10 So. 672, 672 (Miss. 1891); *Cornovski v. St. Louis Transit Co.*, 106 S.W. 51, 54 (Mo. 1907); *Nord v. Boston & Mont. Consol. Copper & Silver Mining Co.*, 75 P. 681, 684 (Mont. 1904); *Ricker v. Freeman*, 50 N.H. 420, 1870 WL 3123, at *6 (1870); *Pendroy v. Great N. Ry.*, 117 N.W. 531, 536 (N.D. 1908); *Baltimore &*

1. Cases decided before *Rogers*

As Justice Souter noted in his *Sorrell* concurrence, before *Rogers* this Court "consistently recognized and applied proximate cause as the proper standard applicable in FELA [hence Jones Act] suits." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). In fact, the proximate cause standard was clearly articulated in the FELA context: "[I]t [i]s incumbent upon [plaintiff] to prove that [defendant] was negligent and that such negligence was the proximate cause in whole or in part of the . . . accident." *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32 (1944). *See also, Norfolk & W. Ry. Co. v. Earnest*, 229 U.S. 114 (1913) (If defendant did not exercise "reasonable care and caution, and [the] failure to do so was the proximate cause of the accident, then [you] must find for the plaintiff"); *St. Louis, Iron Mountain & S. Ry. Co. v. McWhirter*, 229 U.S. 265, 280 (1913) (Defendant's alleged negligence must be shown to be the proximate cause of the damage); *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 67 (1943) (Whether the carrier was negligent and whether that negligence

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Ohio R.R. v. Kreager, 56 N.E. 203, 205 (Ohio 1899); *Trickey v. Clark*, 93 P. 457, 460 (Or. 1908); *Rosevear v. Borough of Osceola Mills*, 32 A. 548, 560 (Pa. 1895); *Cooper v. Georgia, Carolina & N. Ry.*, 39 S.E. 543, 545-56 (S.C. 1901); *Mayor of Knoxville v. Cox*, 53 S.W. 734, 735 (Tenn. 1899); *Gulf, Colo. & Santa Fe Ry. v. Shieder*, 30 S.W. 902, 903 (Tex. 1895); *Barrickman v. Marion Oil Co.*, 32 S.E. 327, 333 (W. Va. 1898); *Bolin v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 84 N.W. 446, 448 (Wis. 1900).

was a proximate cause of the accident are the questions to be decided under FELA).[11]

2. Cases decided after Rogers

In a competing concurrence in *Sorrell*, Justice Ginsburg stated the question of what a plaintiff must prove to submit his FELA/Jones Act case to a jury is well settled, citing two post-*Rogers* cases, *Consol. R. Corp. v. Gottshall*, 512 U.S. 532 (1994) and *Crane v. Cedar Rapids & Iowa City R. Co.*, 395 U.S. 164 (1969), while acknowledging both decisions rely upon the Court's opinion in *Rogers*. But neither *Gottshall* nor *Crane* were concerned with the issue of what a FELA/Jones Act plaintiff must prove to submit his case to a jury. *Gottshall* addressed the proper standard for recognizing legitimate claims of negligent infliction of emotional distress, whereas *Crane* involved the question of

[11] *See also, Lang v. New York Cent.* R.R., 255 U.S. 455, 461 (1921) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926) (same); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934) (same); *St. Louis, Iron Mountain & S. Ry. v. McWhirter*, 229 U.S. 265, 280 (1913); *Davis v. Kennedy*, 266 U.S. 147, 148 (1924); *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Goneau*, 269 U.S. 406, 409-10 (1926); *New York Cent. R.R. v. Ambrose*, 280 U.S. 486, 489 (1930); *Swinson v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Coray*, 335 U.S. at 523 (1949); *Urie*, 337 U.S. at 195; *O'Donnell v. Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Carter v. Atlantic & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 297-98 (1949); *Affolder v. New York, C. & St. L.R. Co.*, 339 U.S. 96, 99 (1950).

whether the defense of contributory negligence was available to a railroad sued by a *non-employee* and the issue of causation involved a determination of state, not federal, law. Therefore, neither case can be read as having explicitly or implicitly rejected proximate cause as the applicable standard under FELA since *Rogers* did not do so. In fact, cases of the Supreme Court decided after *Rogers* reveal that decision was not interpreted by the Court as having abrogated the longstanding rule of proximate cause in FELA/Jones Act cases. *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108 (1963); *Kernan v. American Dredging Co.*, 355 U.S. 426, 434 (1958) (Jones Act case applying the rule that an employer can be liable for a violation of a statutory duty that is "'the proximate cause of the accident'").

In *Sorrell*, although the Court expressly refrained from determining whether the "in whole or in part" language of Section 51 of the FELA addressed the substantive standard of causation, in deciding the issue presented, i.e. whether contributory negligence was to be decided pursuant to the same standard applicable to negligence, the Court stated that such language "made sense" "to make clear that there could be recovery against the [employer] even if it were only partially responsible for the injury." *Sorrell*, 549 at 170. By contrast, this Court noted, it would have made little sense to include the language "in whole or in part" in Section 53 of FELA, which reduces the employee's damages in proportion to contributory negligence, since if the employee's negligence "contributed 'in whole' to his injury,

there would be no recovery against the [employer]." *Id.* The Court's holding in *Sorrell* that the FELA did not "abrogate the common-law approach" regarding the same standard of causation being applicable to an employer's negligence and a plaintiff's contributory negligence since the "statutory text" of the FELA was silent on the issue and the "FELA's text does not support the proposition that Congress meant to take the unusual step of applying different causation standards in a comparative negligence regime, and the statute's remedial purpose cannot compensate for the lack of a statutory basis" is equally applicable to the issue presented in the instant case. The text of FELA is similarly silent with respect to the elimination of the common law element of proximate cause, and the interpretation by the Court as to the reason the phrase "in whole or in part" was included in Section 51, i.e. to make clear that an employer could be liable for an injury if it was partially responsible and if there were other causes, including a plaintiff's contributory negligence, which as a result of the enactment of FELA was no longer a complete bar to recovery, provides the best explanation, consistent with the common law, for inclusion of that phrase in FELA. The concept that there may be multiple causes of injury is wholly compatible with the common law principle that there may not be liability if the cause at issue in the case was not proximate. There is simply no support in the language of the statute for the proposition the "in whole or in part" language of § 51 was additionally intended to relax the standard of causation or that Congress in enacting the

FELA intended to do away with the common law proximate cause requirement.

C. The error in the court's jury charge constituted reversible error as it affected the outcome of the case

The lower court's erroneous and objected-to instruction at the damages-only trial relieved Brown of his burden under the Jones Act of proving that Reinauer's negligence was the proximate cause of his damages by requiring Brown to prove nothing other than that Reinauer's negligence was a "slight" cause, in combination with other causes including naturally occurring conditions of Brown's damages. Since Reinauer's defense at trial was that Brown's allegedly disabling pain was caused not by the accident underlying the law suit but by naturally occurring conditions unrelated to the accident, i.e. his alcoholic and/or diabetic peripheral poly-neuropathy, the instruction completely undermined Reinauer's defense, as was reflected in Brown's attorney's closing argument that all the jury had to conclude in order to hold Reinauer liable for the damages claimed by Brown was find that: "[Brown] was in pain," ". . . that's all you have to decide" (Pet. App. 125a-126a.) and "if you believe he has pain and suffering, has suffered pain since this thing happened, he is entitled to a verdict according to law which the judge will give to you." Pet. App. 127a. Making it clear that the judge's erroneous instructions relieved Brown of *any* burden of proving the damages he claimed were proximately caused by Reinauer's negligence. Brown's

attorney also argued that the verdict sheet did not mention "RSD or anything else" and that all the jury had to find for plaintiff to recover damages was that he had experienced pain and suffering. Pet. App. 127a. As a result of the erroneous instruction the jury was improperly compelled to award Brown the damages that he claimed if it found he suffered disabling pain from unrelated causes such as his peripheral poly-neuropathy from natural causes and that Reinauer's negligence combined "even the slightest" with such causes to disable him.[12]

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[12] After erroneously holding that "a charge employing the language of proximate causation is inappropriate in ... a Jones Act case ..." the Third Department held Reinauer waived its right to a proximate cause charge because Reinauer did not "clearly articulate an appropriate charge on apportionment," a different issue which was not involved in this case. The court specifically stated that because Reinauer did not respond to Brown's counsel's erroneous assertion, made *after* the trial court had already finally and definitively over-ruled Reinauer's objections on the court's refusal to give a proximate cause charge, that Reinauer had the burden of proving the apportionment of damages as between those resulting from pre-existing conditions and those supposedly caused by trauma, that waiver of a correct charge on the different issue of proximate cause somehow occurred. Pet. 115a-119a. Reinauer was not seeking an apportionment charge, but only a charge which correctly informed the jury that it could only be held liable for only those damages determined to have been proximately caused by its negligence. On that issue, Reinauer clearly and timely identified the court's charging error and preserved it for appeal by submitting jury instructions with case citations seeking an instruction that it could only be liable for the damages it was found to have proximately caused, submitting written objections to the proposed instruction of plaintiff and objecting repeatedly on the record to the

Jury instructions which fail to provide the jury with proper guidance as to how to assess responsibility for damages constitute reversible error requiring a new trial. *See Strong v. Henra Realty Corp.*, 89 A.D.2d 829 (1st Dept. 1982). Reversible error requiring a new trial is committed when the court improperly instructs the jury as to the defendant's obligation for damages. *See Coral Gables v. Mayer*, 241 A.D. 340 (1st Dept. 1934). It has long been the rule that error in instructing the jury constitutes reversible error requiring a new trial "if it is possible that the defendant was injured by the error." *Olopp v. Interborough Rapid Transit Co.*, 69 Misc. 595, 597 (App. Term 1910); *Davenport v. Prentice*, 126 A.D. 451 (2d Dept. 1908).

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charge thereby fully complying with New York law as set forth in CPLR §§ 4110-b, 4017 and 5501(3). *See also Arbegast v. Bd. of Educ.*, 65 N.Y.2d 161, 163, fn. 1 (1985). Pet. App. 168a-191a, 115a-119a. The Third Department's alternative holding that Reinauer did not preserve for review the issue of whether the "even the slightest" charge was erroneous because it did not submit appropriate apportionment charges is thus misplaced and incorrect. Apportionment of damages is a concept completely distinct from proximate cause, and, importantly, was not an issue at trial since Brown claimed he was caused to suffer post-traumatic RSD caused by the accident while Reinauer claimed Brown did not have RSD, but other conditions that explained his pain. Neither side argued that a condition existing before the accident was caused to worsen. Reinauer in no way waived its right to a proper charge on the issue of proximate cause, and it did not seek an apportionment charge. Further, Reinauer did not appeal from the failure of the trial court to charge the jury on apportionment.

D. Reliance on ANSI standards to find a violation of a Coast Guard regulation was error requiring reversal

Brown moved for partial summary judgment on the issue of liability on a theory of negligence *per se* arguing that Reinauer violated 46 C.F.R. § 42.15-75(d) and that said violation was the cause of Brown's fall from the roof of the deckhouse of RTC 502. 46 C.F.R. § 42.15-75(d) provides as follows:

> Satisfactory means (in the form of guard rails, lifelines, gangway or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel.

Since 46 C.F.R. § 42.15-75(d) contains no standards or particulars establishing the conduct that may be violative of the regulation in addition to its general standard of "[s]atisfactory means," Brown, in an effort to convince the court that a finding of negligence *per se* was appropriate relied upon an affidavit of Cole in which Brown's liability expert urged that it could be found that Reinauer violated the regulation since the welded single rung ladder aboard RTC 502 allegedly did not comply with ANSI standards. Cole stated in pertinent part in his expert affidavit, upon which the court relied in granting Brown's motion:

> 19. The cited ANSI standards are authoritative with regard to the proper and safe

design of fixed ladders, and relevant to a determination under 46 CFR 42.15-75(d) whether the fixed ladder in question here provided "satisfactory means ... for the protection of the crew" in getting to and from the deckhouse roof.

***

23. The safety concerns underlying the cited ANSI requirements are fully applicable and are if anything exacerbated, in the marine context present here. Since RTC 502 operates on the open sea, seamen ascending and descending the deckhouse ladder are potentially subject to destabilizing forces created by the motion of the sea, and also to the effects of inclement weather, and therefore to an enhanced risk of loss of balance and falling. It is all the more important, given these factors, that ANSI's minimum safety requirements for a safe and efficient means of ascending and descending fixed ladders be observed. Furthermore, there was nothing about the fixed ladder or its location that would have made it inappropriate, or unfeasible, or dangerous, to provide handrails or vertical grab bars, or a top ladder rung, position in accordance with the minimum safety requirements of ANSI A14.2.

***

24. For these reasons, the means provided for protection of the crew of the RTC 502 in

> getting to and from the deckhouse roof was not satisfactory and violated 46 CFR 42.15-75(d).

Pet. App. 56a-76a.

The motion court, rejecting Reinauer's argument that alleged violations of inapplicable ANSI standards may not establish a regulatory violation so as to provide the basis for a finding of negligence *per se* under the Jones Act, held that while the inapplicable ANSI standards could not establish negligence *per se*, they could serve as the "factual predicate" for Cole's opinion that 46 CFR 42.15-75(d) was violated, which the court accepted in granting Brown's motion for partial summary judgment on a negligence *per se* theory, and dismissing the defense of contributory negligence.[13] Pet. App. 50a-55a. Accordingly, the motion court implicitly conceded that the "factual basis" for Cole's opinion 46 CFR 42.15-75(d) was violated was that the fixed welded ladder did not comply with inapplicable ANSI standards. The Appellate Division affirmed this decision, similarly acknowledging that the

[13] Section 53 of FELA (and hence, the Jones Act) provides an injured employee shall not be held to have been "guilty of contributory negligence in any case where the violation by such [employer] of any statute enacted for the safety of employees contributed to the injury or death of such employee." Thus, if the employer is found to have committed an unexcused violation of a safety statute which contributes in fact to the injury, i.e. is liable in negligence *per se*, the employee will recover full damages, even though the employee is contributorily negligent. *Kernan v. American Dredging Co.*, 355 U.S. 426, 433 (1958).

ANSI standards were inapplicable, but nevertheless refusing to disturb the grant of partial summary judgment holding that the inapplicable ANSI standards were "relevant" to Cole's opinion. Pet. App. 14a, n. 1.

Cole's opinion that 46 CFR 42.15-75(d) was violated was based exclusively upon the alleged failure of the welded steel rung ladder aboard RTC 502 to meet the ANSI standards and the courts below clearly erred thereby expanding Reinauer's liability beyond that provided for under the Jones Act. Indeed, Reinauer was found to be negligent *per se* with the result that its defense of contributory negligence was dismissed (45 U.S.C.S. § 51; *Kernan v. American Dredging Co.*, 355 U.S. 426, 433 (1958)), not for violating any standard of any regulation promulgated by the regulatory authority with jurisdiction over Reinauer's barge RTC 502, i.e. the Coast Guard, but for alleged violation of non-applicable, non-binding standards promulgated by a non-governmental agency with no demonstrated interest or expertise in the maritime field. The regulation promulgated by the Coast Guard contained no standards, but was general in nature, requiring only that a shipowner provide "satisfactory means" of access.

While negligence *per se* has long been recognized in actions brought under FELA/the Jones Act (*e.g.*, *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958)), a finding of negligence *per se* can only be premised upon the violation of a legislative enactment. *See Ries v. Amtrak*, 960 F.2d 1156 (3d Cir.

1992); *Cole v. Noble Drilling Corp.*, 2007 U.S. Dist. LEXIS 64055, 9-10 (S.D. Miss. Aug. 28, 2007). ANSI is the "coordinator of the United States private sector voluntary standardization system" and "ANSI standards do not have the force of law, absent adoption by statute, ordinance, or regulation." *Knarr v. Chapman Sch. Of Seamanship*, 2000 U.S. Dist. LEXIS 5351 (E.D.Pa. April 14, 2000); *see Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 713 (5th Cir.1981). As clear is that federal regulations that do not provide specific standards for compliance cannot be grounds for a negligence *per se* finding. *See, e.g., Johnson v. Horizon Lines*, 520 F. Supp.2d 524 (S.D.N.Y. 2007); *Wilson v. Maersk Line, Ltd.*, 2007 U.S. Dist LEXIS 81135 (S.D.N.Y. Oct. 18, 2007); *Skidmore v. Delta Airlines*, 200 WL 1844675 at *4 (Dec. 15, 2000, N.D. Tex). Indeed, it is well settled that general duty statutes which require reference to negligence standards in order to discern whether there has been a violation, do not give rise to liability in negligence *per se*.[14]

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[14] *See Klyn v. Aruta*, 517 N.E.2d 992 (1986); *Lewis v. Horace Mann Ins. Co.*, 410 F. Supp. 2d 640, 656-657 (N.D. Ohio 2005); *Westervelt v. Rooker*, 447 N.E.2d 1307, 1309 (Ohio 1983); *Lester v. John R. Jurgensen Co.*, 400 F.2d 393, 395-396 (6th Cir. Ohio 1968); *Lee v. State Farm Mut. Auto. Ins. Co.*, 2006 U.S. Dist. LEXIS 73923 (D. Ariz. Oct. 10, 2006); *Hutto v. Francisco*, 107 P.3d 934, 937 (Ariz. App. 2005); *Pinnacle Bank v. Villa*, 2004 WY 150 (Wyo. 2004); *Borden, Inc. v. Price*, 939 S.W.2d 247, 250 (Tex. App. Amarillo 1997); and *Dahle v. Atlantic Richfield Co.*, 725 P.2d 1069, 1073-1074 (Alaska 1986) (a regulation amounting to "little more than duplication of the common law duty to act reasonably" is not a proper basis for a negligence *per se* instruction); federal law: *Wilson*

The court below, by granting partial summary judgment on the issue of negligence *per se* on the basis of an expert opinion that the welded ladder aboard Reinauer's vessel violated inapplicable ANSI standards not only expanded Reinauer's liability as shipowner beyond that envisioned in the Jones Act, but served to deprive Reinauer of a jury trial on the issues of liability and Brown's comparative negligence. As was set forth in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990), "[m]aritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." The decision of the Appellate Division affirmance of the order granting partial summary judgment on a theory of negligence *per se* as a result of Reinauer's purported violation of standards published by ANSI as opposed to any legislative enactment expanded the remedies afforded seaman under the Jones Act, and served to deprive Reinauer not only of a jury trial on the issue of liability, but of its statutory defenses under the Jones Act. Since ANSI standards do not apply to the fixed welded ladder aboard Reinauer's vessel, and, in turn, said ladder need not comply with them although it was fully compliant with Coast Guard regulations, application of the ANSI standards as a basis for a summary finding

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v. Maersk Line, Ltd., 2007 U.S. Dist. LEXIS 81135, 5-6 (S.D.N.Y. Oct. 18, 2007); *Rimer v. Rockwell International Corp.*, 641 F.2d 450 (6th Cir. Ohio 1981); *King v. Avtech Aviation, Inc.*, 655 F.2d 77, 79 (5th Cir. 1981) (14 C.F.R. § 91.163 (1980).

of liability placed Reinauer as shipowner in a position where it was stripped, without a jury trial, of its defenses to liability although its vessel was fully in accord with applicable Coast Guard regulations. Such a result deprived Reinauer of its statutory rights under the Jones Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/_____

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APPENDIX

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COURT OF APPEALS
STATE OF NEW YORK

Appellate Division – Third Department
Case No. 504919
Ulster County Index No. 1712/05
Court of Appeals Motion No. 2010-99

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs-Respondents,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants-Appellants.

PLEASE TAKE NOTICE, that the within is a true copy of an Order duly entered in the office of the clerk of the Court of Appeals of the State of New York on April 6, 2010.

Dated: Newburgh, New York
April 6, 2010

LARKIN, AXELROD, INGRASSIA
& TETENBAUM, LLP

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George Brown v Reinauer Transp. Cos., LLC
Motion No: 2010-99
Slip Opinion No: 2010 NY Slip Op 65742
Decided on April 06, 2010
Court of Appeals Motion Decision
Published by *New York State Law Reporting Bureau* pursuant to Judiciary Law § 431.
This motion is uncorrected and subject to revision before publication in the Official Reports.

George Brown et al.,

Respondents,

v

Reinauer Transportation Companies, LLC, et al.,

Appellants.

Motion, insofar as it seeks leave to appeal from the Appellate Division order denying reargument or, in the alternative, leave to appeal to this Court, dismissed upon the ground that such order does not finally determine the action within the meaning of the Constitution; motion for leave to appeal otherwise denied.

COURT OF APPEALS
STATE OF NEW YORK

Appellate Division – Third Department
Case No. 504919

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

ORDER OF THE COURT OF APPEALS
WITH NOTICE OF ENTRY

LARKIN, AXELROD, INGRASSIA & TETENBAUM, L.L.P.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

Case No. 504919

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs-Respondents,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants-Appellants.

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of a Decision and Order duly entered in the office of the clerk of the Appellate Division, Third Department, on December 9, 2009.

Dated: Newburgh, New York
December 11, 2009

LARKIN, AXELROD, INGRASSIA
& TETENBAUM, LLP

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State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 9, 2009
Case # 504919

GEORGE BROWN et al., Respondents,

v

REINAUER TRANSPORTATION COMPANIES, LLC, et al., Appellants.

DECISION AND ORDER ON MOTION

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

CARDONA, P.J., MERCURE, ROSE and GARRY, J.J., concur.

ENTER:

/s/ MICHAEL J. NOVACK
Michael J. Novack
Clerk of the Court

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: September 10, 2009
504919

GEORGE BROWN et al.,

Respondents,

v

REINAUER TRANSPORTATION COMPANIES, LLC, et al.,

Appellants.

OPINION AND ORDER

Calendar Date: May 27, 2009

Before: Mercure, J.P., Rose, Kane and Garry, JJ.

Kenny, Stearns & Zonghetti, L.L.C., New York City (Joseph T. Stearns of counsel), for appellants.

Larkin, Axelrod, Ingrassia & Tetenbaum, L.L.P., Newburgh (James Alexander Burke of counsel), for respondents.

Mercure, J.P.

Appeals (1) from an order of the Supreme Court (O'Connor, J.), entered February 6, 2008 in Ulster County which, among other things, granted plaintiffs' motion to preclude expert testimony, (2) from an order of said court, entered May 12, 2008, which granted plaintiffs' motion for partial summary judgment on the issue of liability under the Jones Act, (3) from two orders of said court, entered June 18, 2008, which denied defendants' motions for reconsideration, and (4) from a judgment of said court (Cahill, J.), entered October 16, 2008, upon a verdict rendered in favor of plaintiffs on the issue of damages.

In July 2003, plaintiff George Brown (hereinafter plaintiff) was injured, allegedly as a result of a fall from a ladder on a barge owned and operated by defendants, his employers. Plaintiff asserted that he fell 8 to 10 feet to the deck of the barge when an antenna pole that he was using as a handrail broke. At the time, plaintiff was attempting to descend from the barge's deckhouse roof, where he had been filling tanks that supplied fuel to discharge the barge's cargo. Plaintiff and his wife, derivatively, commenced this action under the Jones Act (46 USC § 30104 *et seq.*) and general maritime law, alleging that defendants were negligent in allowing unsafe conditions to exist on the barge and in failing to provide plaintiff with a safe place to work, that the barge was unseaworthy, and that plaintiff is entitled to maintenance and cure.

Following joinder of issue, plaintiffs moved for, among other things, preclusion of the testimony of defendants' medical expert and for partial summary judgment on liability under the Jones Act. Supreme Court (O'Connor, J.) granted both motions and denied defendants' subsequent motions for reargument of the order precluding their expert's testimony and for reargument and renewal of the order granting partial summary judgment. Thereafter, Supreme Court (Cahill, J.) held a trial on damages, at the close of which the jury rendered a verdict in plaintiffs' favor. Defendants appeal from the orders granting plaintiffs' motions to preclude expert trial testimony and for partial summary judgment on liability, as well as the orders denying their motions for reargument or renewal and the judgment in the amount of $5,299,210.21 entered upon the verdict in plaintiffs' favor.[1]

---

[1] To the extent that defendants' motions for reargument or renewal can be deemed motions for reargument, no appeal lies from the denial of a motion to reargue (*see Mortgage Elec. Registration Sys., Inc. v Schuh*, 48 AD3d 838, 840 [2008], *appeal dismissed* 10 NY3d 951 [2008]; *King v Town Council of Coxsackie*, 35 AD3d 1120, 1120 [2006]). Insofar as the motions can be construed as seeking renewal, they were properly denied inasmuch as it is undisputed that the evidence that defendants presented in connection with the motions was not newly discovered evidence (*see King v Town Council of Coxsackie*, 35 AD3d at 1120; *Wahl v Grippen*, 305 AD2d 707, 707 [2003]; *Carota v Wu*, 284 AD2d 614, 617 [2001]). Our review of the order granting partial summary judgment and precluding the testimony of defendants' expert is therefore limited to the record upon which those decisions were made

Initially, we reject defendants' argument that Supreme Court (O'Connor, J.) erred in granting plaintiffs' motion for partial summary judgment on liability under the Jones Act based upon negligence per se. "The Jones Act . . . provides seamen with special statutory protections in the area of personal injury suits[,] . . . plac[ing] a . . . duty on the [shipowner] to provide a reasonably safe workplace." (*Wills v Amerada Hess Corp.*, 379 F.3d 32, 41-42 [2d Cir 2004], *cert denied* 546 US 822 [2005] [internal quotation marks and citations omitted]).[2] The Jones Act extends to seamen all rights afforded to railroad workers under the Federal Employers Liability Act, "includ[ing] a bar against comparative negligence for violations of statutes enacted for the safety of employees" (*Jones v Spentonbush-Red Star Co.*, 155 F3d 587, 595 [2d Cir 1998]; *see* 46 USC § 30104; *Kernan v American Dredging Co.*, 355 US 426, 438-439 [1958]). The parties do not dispute that this bar against comparative negligence extends to instances involving the violation of a Coast Guard regulation (*see Fuszek v Royal King Fisheries, Inc.*, 98 F3d 514, 516-517 [9th Cir 1996], *cert denied* 520 US 1155 [1997]; *Johnson v*

(*see Carriero v Town Bd. of Town of Stillwater*, 41 AD3d 1011, 1012 n [2007], *lv dismissed and denied* 9 NY3d 980 [2007], *lv dismissed* 12 NY3d 838 [2009]; *McKelvey v White*, 184 AD2d 834, 835 [1992]).

[2] "In maritime cases, State courts must apply Federal law to secure a single and uniform body of maritime law" (*Lerner v Karageorgis Lines*, 66 NY2d 479, 484-485 [1985] [internal quotation marks and citations omitted]).

Horizon Lines, LLC, 520 F Supp 2d 524, 527 [2007]; *see also Jones v Spentonbush-Red Star Co.*, 155 F3d at 595); nor do they dispute that, in the context of the Jones Act, negligence per se may be demonstrated by a showing of five factors: "(1) a violation of Coast Guard regulations, (2) the plaintiff's membership in the class of intended beneficiaries of the regulations, (3) an injury of a type against which the regulations are designed to protect, (4) the unexcused nature of the regulatory violation, and (5) Causation" *(Smith v Trans-World Drilling Co.*, 772 F2d 157, 160 [5th Cir 1985]; *accord Fuszek v Royal King Fisheries. Inc.*, 98 F3d at 517). With respect to the fifth factor, we note that a plaintiff in a Jones Act case bears a reduced burden of proof on the issue of causation, such that if the alleged violation played any part, even in the slightest degree, causation is established (*see Wills v Amerada Hess Corp.*, 379 F3d at 47 n 8; *Smith v Trans-World Drilling Co.*, 772 F2d at 161).

Here, plaintiffs alleged that defendants were negligent per se based upon a violation of Coast Guard regulation 46 CFR 42.15-75(d). That provision is entitled "Protection of the Crew" and provides that "[s]atisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel" (46 CFR 42.15-75[d]).[3] We agree with Supreme Court that plain-

[3] As plaintiffs correctly assert, although a very general regulation will not provide a basis for liability under the

tiffs met their burden of establishing entitlement to summary judgment on their claim of negligence per se under the Jones Act, including the burden of demonstrating prima facie that defendants violated 46 CFR 42.15-75(d).

In connection with their motion for partial summary judgment on liability, plaintiffs contended that defendants violated the regulation because the ladder attached to the deckhouse bulkhead did not provide satisfactory means for the protection of the crew in accessing the deckhouse roof as part of the necessary work of the vessel. In that regard, they presented the affidavit of David Cole, a maritime expert and retired Coast Guard Commander, opining that the vessel at issue was a "permissively manned barge" subject to the requirements of 46 CFR 42.15-75(d), and that the ladder was not a "satisfactory means" of getting to and from the deckhouse roof within the meaning of the regulation because it had no handrail above the deckhouse roof, and a grab bar affixed to the roof was too low to facilitate safe ascent and descent by the crew. Cole referenced a data sheet from the National Safety Council and American National Standard Institute (hereinafter ANSI) guidelines for ladders and explained that the position of this particular

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Jones Act (*see Wilson v Maersk Line, Ltd.*, 2007 WL 3085436, at *2, 2007 US Dist LEXIS 81135, *6 [SD NY 2007]), 46 CFR 42.15-75 (d) has been found to be a valid predicate for a finding of negligence per se under the statute (*see Wuestewald v Foss Mar. Co.*, 319 F Supp 2d 1002, 1008 [ND CA 2004]; *see also Pilare v Matson Nav. Co.*, 2006 WL 3533030 *2-*3, 2006 US Dist LEXIS 88579, *5-*9 [ND CA 2006]).

ladder's grab bar made it awkward and unsafe.[4] He further stated that use of the corroded antenna pole running vertically along the ladder was inevitable given the absence of a proper handrail in the same location. Cole indicated that, for these reasons, the means provided for accessing the deckhouse roof were not satisfactory for the protection of the crew and constituted a violation of 46 CFR 42.15-75(d).

With respect to the remaining elements of a negligence per se claim—plaintiff's membership in a class of intended beneficiaries, injuries of the type against which the regulations were designed to protect, an unexcused violation, and causation (*Smith v Trans-World Drilling Co.*, 772 F2d at 160)—it is undisputed that plaintiff, as a member of the barge's crew, was an intended beneficiary if the regulation applied and that his injuries, which occurred when he fell while descending from the deckhouse roof in performing routine work on the barge, were of the requisite type (*see Wuestewald v*

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[4] The parties are in agreement that violations of the cited ANSI guidelines cannot, in themselves, provide a basis for a finding of negligence per se because those guidelines have not been incorporated into Coast Guard regulations (*see Suthrlen v Diamond Offshore Co., Inc.*, 2008 WL 2540691, *4, 2008 US Dist LEXIS 47656, *12 [WD LA 2008]; *see generally Jones v Spentonbush-Red Star Co.*, 155 F3d at 595-596). As Supreme Court explained, however, Cole did not opine that defendants were negligent per se because they violated ANSI requirements; rather, he stated that the ANSI guidelines are relevant to his determination of whether the ladder provided "satisfactory means" of access within the meaning of 46 CFR 42.15-75(d).

Foss Mar. Co., 319 F Supp 2d at 1008). Regarding the unexcused nature of the violation, failure to comply with a regulation may be excused when there is "a present emergency or other condition [rendering compliance] . . . more dangerous than [a] violation of the regulations" *(Smith v Trans-World Drilling Co.*, 772 F2d at 161). In his expert affidavit, Cole stated his conclusion that there was nothing about the fixed deckhouse ladder or its location that would have made installation of suitable handrails and removal of the corroded antenna pole unfeasible or the ladder itself more dangerous. Finally, plaintiffs presented eyewitness testimony, as well as testimony of the captain of the tugboat that was delivering fuel to the barge, corroborating plaintiff's version of the accident—that he fell after the antenna pole that he was using as a handrail broke while he was attempting to climb down the ladder. Mindful that "the question of causation in a Jones Act claim turns on whether the acts or omissions of [defendants] contributed to [plaintiff's] injury in even the slightest degree" (*id.* at 161), we conclude that plaintiffs established prima facie entitlement to summary judgment on liability, thereby shifting the burden to defendants to demonstrate the existence of material questions of fact *(see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In response, defendants presented the affidavit of their expert, Michael Russell, a retired Coast Guard Lieutenant Commander, who asserted primarily that 46 CFR 42.15-75(d) does not apply to

the vessel at issue because it is an "unmanned barge" and, thus, expressly exempted from compliance with that provision (*see* 46 CFR 42.20-13[c]; *see generally Roy Crook & Sons, Inc. v Allen*, 778 F2d 1037, 1041-1042 [5th Cir 1985]). Although Russell acknowledged that the Coast Guard Certificate of Inspection designated the vessel as "Permissively Manned," he stated that the "unmanned" designation is the default classification for barges and that a permissively manned designation does not change the unmanned status of a barge. Russell's sole source of authority for this statement is a response from the Coast Guard to a question raised during a notice and comment period. The question, however, involved only manned barges and asked whether maintenance persons would "count as the barge's required manning"; it did not address the distinction between manned and unmanned barges. In our view, the Coast Guard's response that "[maintenance persons with no duties related to the navigation of the vessel may be permitted . . . without, in effect, increasing the manning of the barge," does not establish that—contrary to the plain meaning of the term—"permissively manned" barges must be considered to be unmanned and exempt from regulations designed to protect the safety of the barge's crew. In the absence of any further evidence to support defendants' interpretation of 46 CFR 42.15-75(d) as inapplicable to permissively manned barges and given the evidence presented by plaintiffs that the Coast Guard deems barges to be "manned" whenever manning is either required or permitted, we

cannot say that Supreme Court erred in declining to rule that permissively manned barges are exempt from 46 CFR 42.15-75(d) as a matter of law (*see generally Morris v Pavarini Constr.*, 9 NY3d 47, 51 [2007]).

Regarding whether the ladder at issue was in compliance with that regulation, defendants' expert stated only that, "in [his] professional opinion, the fixed, individual rung ladder affixed to the after deckhouse bulkhead of [the barge] is suitable for its intended purpose of providing access, as needed, to the deckhouse roof, and therefore is in all regards compliant with the requirements of that section." Furthermore, defendants presented no evidence refuting the proof that plaintiff was a member of the barge's crew, the injury was of the type that the regulation was designed to protect against, and that compliance with the regulation was not more dangerous than noncompliance. On the issue of causation, defendants presented only a single page of plaintiff's deposition testimony indicating that he had previously used the ladder approximately 100 times without falling. We note that many of the claims now raised by defendants—including their assertions that the Coast Guard Inspection Certification is evidence of compliance with the regulation, arguments regarding purported inconsistencies in the testimony regarding the cause of the accident, and their contention that the ladder was identical to those deemed compliant by Occupational Health and Safety Administration regulations—were not raised in opposition to plaintiffs' motion for partial summary judgment and, thus,

are unpreserved for our review (*see e.g. County of Orange v Grier*, 30 AD3d 556, 556 [2006]; *Sager Spuck Statewide Supply Co. v Meyer*, 273 AD2d 745, 746 [2000]). In our view, the evidence that was presented in a timely manner "lacked sufficient probative value to raise a genuine issue of fact and forestall [an] award of summary judgment" (*DeLeonardis v Gaston Paving Co.*, 271 AD2d 839, 842 [2000]; *see generally Hubert v Tripaldi*, 307 AD2d 692, 693-694 [2003]).[5]

Turning to defendants' arguments regarding the trial held on damages, we further reject their contention that Supreme Court erred in granting plaintiffs' motion to preclude the testimony of defendants' medical expert, George Brief, " '[T]he admissibility of expert testimony on a particular point is addressed to the discretion of the trial court' " (*Goverski v Miller*, 282 AD2d 789, 790 [2001], quoting *De Long v County of Erie*, 60 NY2d 296, 307 [1983]). Brief, a board certified specialist in internal medicine and cardiology, was to testify, based upon his review of plaintiff's medical records, that plaintiff was suffering from cardiomyopathy resulting in fatigue, impaired balance and body control, which could have caused his fall. Inasmuch as the record contains no evidence that plaintiff was suffering from any symptoms related to the cardiomyopathy at the time of the fall, Supreme

[5] Defendants also asserted that the ANSI standards referenced in Cole's affidavit had not been incorporated into the Federal Code and, thus, were not applicable. As noted above, plaintiffs did not base their claim of negligence per se on an alleged violation of these ANSI standards.

Court properly concluded that Brief's proposed "testimony was too speculative to constitute competent expert proof of causation" (*Pascuzzi v CCI Cos.*, 292 AD2d 685, 687 [2002] [internal quotation marks and citation omitted]; *see People v Walker*, 223 AD2d 414, 415 [1996], *lv denied* 88 NY2d 887 [1996]; *cf. Pember v Carlson*, 45 AD3d 1092, 1094 [2007]).

With respect to defendants' challenges regarding the jury charge given at the close of the trial, we conclude that there is no merit to their arguments that Supreme Court (Cahill, J.) erred in instructing the jury that liability had been previously determined and in refusing to give defendants' proposed charge on proximate causation. Further, their claim regarding the absence of a charge on apportionment of damages is not preserved for our review. The court's instruction that liability had been established correctly stated the procedural posture of the case given the prior grant of summary judgment in plaintiffs' favor. Moreover, a charge employing the language of proximate causation is inappropriate in the context of a Jones Act case, in which an employer is liable for damages if its "negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (*Rogers v Missouri Pac. R.R. Co.*, 352 US 500, 506 [1957]; *see DeLima v Trinidad Corp.*, 302 F2d 585, 587-588 [2d Cir 1962]).

It must be noted, however, that despite the reduced burden of proof on causation, apportionment for injuries attributable solely to a plaintiff's preexisting conditions is nevertheless appropriate

in Jones Act cases.[6] Here, defendants requested an apportionment charge that would have relieved them of the burden of proof regarding the extent of the damages caused by plaintiff's preexisting conditions. Plaintiffs, in response, contended that the burden of proof regarding preexisting conditions and the apportionment of damages to those conditions should be placed on defendants (*see generally Stevens v Bangor & Aroostook R.R. Co.*, 97 F3d 594, 601-602 [1st Cir 1996]; *Maurer v United States*, 668 F2d 98, 100 [2d Cir 1981]; *Ahlf v CSX Transp.*, 386 F Supp 2d 83, 91 [ND NY 2005]). Inasmuch as defendants failed to thereafter clearly articulate on the record any further objections with respect to an appropriate charge on apportionment—as opposed to the charge given on negligence and proximate cause—they failed to preserve their current argument now advanced before us that Supreme Court erred in declining to give *any* charge on the issue of apportionment, without regard to the burden of proof (*see Hunt v Bankers & Shippers Ins. Co. of N.Y.*, 50 NY2d 938, 940 [1980]; *Klotz v Warick*, 53 AD3d 976, 978-979 [2008], *lv denied* 11 NY3d 712 [2008]; *Morris v Patane*, 39 AD3d 1054, 1055 [2007]).

Finally, we are unpersuaded by defendants' arguments that the verdict is not supported by the

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[6] That is, if "a defendant's negligence aggravates a plaintiff's preexisting health condition, the defendant is liable only for the additional increment caused by the negligence and not for the pain and impairment that the plaintiff would have suffered even if the accident had never occurred" (*Stevens v Bangor & Aroostook R.R. Co.*, 97 F3d 594, 601 [1st Cir 1996]).

evidence and that the jury's award on damages was excessive. A verdict will be stricken for legal insufficiency when " 'there is simply no valid line of reasoning and permissible inferences which could lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' " (*Nolan v Union Coll. Trust of Schenectady, N.Y.*, 51 AD3d 1253, 1255 [2008], *lv denied* 11 NY3d 705 [2008], quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Furthermore, "[i]n evaluating the excessiveness of awards of damages in [Jones Act] cases, the courts apply the federal standard of whether the damages awarded are so excessive as to shock [the] judicial conscience" (*Hotaling v CSX Transp.*, 5 AD3d 964, 970 [2004] [internal quotation marks and citation omitted]). Here, given the testimony of plaintiff's life care planner, as well as the evidence that plaintiff fractured his hip, underwent multiple surgeries, is permanently disabled from work, and has suffered from extreme pain since the fall due to causally related reflex sympathetic dystrophy, we cannot say that the verdict is unsupported by sufficient evidence or that the jury's award shocks the conscience (*see id.* at 969-970; *Serrano v 432 Park S. Realty Co., LLC*, 59 AD3d 242, 242-243 [2009]; *see also Young v Tops Mkts.*, 283 AD2d 923, 924-925 [2001]).

Defendants' remaining arguments have been considered and found to be lacking in merit.

Rose, Kane and Garry, JJ., concur.

ORDERED that the orders and judgment are affirmed, with costs.

ENTER:

/s/ MICHAEL J. NOVACK
Michael J. Novack
Clerk of the Court

Notice of Appeal, dated May 28, 2008

Kenny, Stearns & Zonghetti, LLC
Attorneys for Defendant
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New York, New York 10004

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Civil Action
Index No.: 05-1712
Hon. Kimberly A. O'Connor

GEORGE BROWN,

Plaintiff(s),

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, LP, THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendant(s).

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that the DEFENDANTS hereby appeal to the Appellate Division, Third Department, from Order of the Supreme Court of the

State of New York, County of Ulster (Hon. Kimberly A. O'Connor, J.) granting plaintiff partial summary judgment, dated April 28, 2008 and entered May 12, 2008, and from each and every part thereof.

Dated: New York, New York
May 28, 2008

Kenny, Stearns & Zonghetti, LLC
Attorneys for Defendant
Reinauer Transportation Companies, LLC

By: /s/ KEVIN J. O'DONNELL
Kevin J. O'Donnell
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Decision and Order of the Honorable Kimberly A. O'Connor, dated April 28, 2008, Appealed From [pp. 10a – 16a]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

Index No.: 05-1712
RJI No.: 55-05-01165
Filed May 12, 2008

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC; REINAUER TRANSPORTATION COMPANIES, L.P.; THE REINAUER COMPANIES, INC.; REINAUER MARITIME COMPANY, LLC; and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

(Supreme Court, Ulster County, All Purpose Term)
(Justice Kimberly A. O'Connor, Presiding)

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APPEARANCES: LARKIN, AXELROD, INGRASSIA
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DECISION AND ORDER

O'CONNOR, J.:

Plaintiffs have moved for partial summary judgment on the issue of liability on the claim made pursuant to the Jones Act, 46 USC § 688 and declaring that defendants violated Coast Guard Regulation 46 CFR § 42.15-75(d), that plaintiff George Brown (hereinafter plaintiff) was a member of the class of intended beneficiaries of the regulation, that plaintiff sustained an injury of the type against which the regulation was designed to protect that the violation was without excuse, that the violation was a contributing cause of the plaintiff's injury, that defendants were therefore negligent per se and that any finding of comparative negligence by the plaintiff is barred.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact *(see Andre* v *Pomeroy*, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Bush v St. Clare's Hosp.*, 82 N Y2d 738,739 [1993]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). The Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact *(see Boyce* v *Vazquez*, 249 AD2d 724, 726 [3d Dep't 1998); *Martin* v *Briggs*, 235 AD2d 192, 196 [1st Dep't 1997]; *Simpson v Simpson*, 222 AD2d 984, 986 [3d Dep't 1995]).

The instant action arises out of a fall from a permanent ladder on a seagoing barge owned and operated by the defendants. Plaintiff has submitted deposition transcripts from himself and a crew member of the tugboat which was propelling the barge at the time indicating that plaintiff was the captain of the barge which was manned by a two man crew, including the plaintiff. As part of the work of the barge, plaintiff was required to ascend

the ladder to the top of the aft deckhouse in order to fill fuel tanks which supplied fuel to the pumps used to discharge the barge's cargo. Plaintiff had been engaged in such work just before his fall. As he was attempting to descend the ladder, he utilized a makeshift television antenna mast or pole to assist him in starting down the ladder. The pole detached from its base, causing him to fall to the deck of the barge.

Plaintiff has also submitted an affidavit from David Cole, a retired Coast Guard Commander, opining that because the barge was permissively manned, the provisions of 46 CFR § 42.15-75(d) were applicable. Such regulation requires a vessel to provide a satisfactory means for the crew to get to and from all parts of the vessel which are used in the necessary work of the vessel. He further opined that the fixed ladder as originally built was not reasonably safe. He referred to and relied upon standards of the National Safety Counsel and ANSI which set forth safety requirements for fixed ladders. As built, the ladder involved in this action had a top rung which was too far below the top surface of the deckhouse making it difficult securely to reach such first rung when descending the ladder. In addition, there were no vertical extensions of the ladder above the roof of the deckhouse to allow a person to start down the ladder in a stable, near upright position. He further opined that the antenna mast was placed such that it would be used as a vertical extension of the ladder. In fact, plaintiff testified that he regularly so used the mast in such fashion, and was doing so at the time of his fall.

Mr. Cole concluded that the mast or pole was not satisfactory for the protection of the crew because it failed, causing or contributing to plaintiff's fall and that defendants violated 46 CFR § 42.15-75(d) for failure to provide a satisfactory means of getting to and from the deckhouse roof.

Plaintiff seeks a determination that the violation of the regulation constituted negligence *per se*, thereby precluding consideration of any comparable negligence on his part. "Five elements of a Jones Act negligence *per se* claim are the following: (1) a violation of Coast Guard regulations, (2) the plaintiff's membership in the class of intended beneficiaries of the regulations, (3) an injury of a type against which the regulations are designed to protect, (4) the unexcused nature of the regulatory violation, and (5) causation. *Reyes v Vantage S.S.* Co., *Inc.*, 558 F2d 238, 242-44 (5th Cir 1977) (*Reyes I*), modified, 609 F2d 140 (1980) (*Reyes II*)." (*Smith v Trans-World Drilling Co.*, 772 F2d 157, 160-161 [5th Cir 1985]; *see also Fuszek* v *Royal King Fisheries, Inc.*, 98 F3d 514, 516-517 [9th Cir 1996]; *Roy Crook and Sons, Inc. v Allen*, 778 F2d 1037, 1043 [5th Cir 1985]). The failure to provide a satisfactory ladder causing injury to a seaman has been held to constitute negligence *per se* under the Jones Act (*see Wuestewald v Foss Maritime Co.*, 319 F Supp 2d 1002, 1007 (N D Cal 2004). Plaintiff's expert has made a sufficient showing of a violation of 46 CFR § 42.15-75, which is entitled "Protection of the Crew." Plaintiff was clearly a member of the crew and his injury was of a type against which the regulation was designed to protect. Mr. Cole has also opined

that there was nothing about the configuration or location of the ladder which would have made it difficult or infeasible to provide a proper vertical extension. Mr. Cole has also offered evidence that the regulatory violation caused or contributed to plaintiff's injuries. The Court therefore finds that plaintiff has made a prima facie showing of a right to partial summary judgment on the issue of liability under the Jones Act.

The burden is therefore shifted to defendants to come forward with evidence showing the existence of a triable issue of fact. Defendants have submitted only an affidavit from Michael Russell, a retired Coast Guard Lt. Commander. Such affidavit is comprised primarily of legal arguments concerning the applicability of 46 CFR § 42.15-75(d) and the ladder safety standards considered by Mr. Cole. Mr. Russell contends that 46 CFR § 42.20-13 exempts unmanned barges from the provisions of 46 CFR § 42.15-75(d) and further that the subject barge was considered unmanned because its crew of two was merely permissive. He relies upon a response to a comment to an unrelated regulation in which the Coast Guard stated that permissive manning does not result in "increasing the manning of the barge."

It appears that there are three categories of manning of barges, manned, unmanned and permissively manned. A manned vessel must be operated with the minimum crew complement set forth in the vessel's certificate of inspection *(see e.g. Roy Crook and Sons, Inc. v Allen,* 778 F2d at 1041). A permissively manned vessel does not require any

crew, but is allowed to have the specified number of crew members on board when at sea. An unmanned vessel does not have any crew. 46 CFR § 4220-13 exempts unmanned barges from a number of different provisions designed to safeguard the crew of a vessel, presumably because there is no crew. The Court finds that the comment cited by Mr. Russell should be construed as stating that allowing permissive crew members does not increase the minimum number of required crew rather than implying that a permissively manned vessel is unmanned. There is no indication in 46 CFR § 42.20-13 of an intent to deny permissive crew members the safety protections of the regulations. Indeed, the United States Coast Guard Marine Safety Manual specifically provides that "[w]hen seagoing barges are manned, whether manning is required or permitted, the requirements of 46 CFR 94 [Lifesaving Equipment] apply." It thus appears that the Coast Guard considers a permissively manned vessel to be manned. Defendants have not offered a sufficient basis to warrant ignoring the plain language of 46 CFR § 42.20-13 restricting its application to unmanned barges. It is therefore determined that the exemption does not apply to barges with a permitted crew. As such, 46 CFR § 42.15-75(d) is applicable to the subject barge.

Mr. Russell's legal arguments concerning the applicability of ANSI ladder standards are also misplaced. Plaintiff's expert did not opine that the ANSI standards were legally binding. Rather, he used them as a factual predicate for his opinion that the subject ladder did not provide a satisfactory

means of getting to and from the deckhouse roof. In contrast, Mr. Russell provided a bare, conclusory opinion that the ladder was suitable for its purpose. His opinion was not supported by any evidence of the standard in the industry or any recognized safety standards. As such, the defendants' expert's affidavit is not based upon stated facts on the record and is excessively conclusory *(see Sprung v MTR Ravensburg,* 99 NY2d 468, 475 [2003]; *Romano v Stanley,* 90 NY2d 444, 451 [1997]). Moreover, Mr. Russell does not even mention the existence of the antenna mast or pole, its foreseeable use as a ladder extension or its failure *(see Hubert v Tripaldi,* 307 AD2d 692, 693-694 [3d Dep't 2003]). It is therefore determined that defendants have failed to show a triable issue of fact with respect to a violation of 46 CPR § 42.15-75(d).

Defendants' submissions do not address whether the plaintiff was a member in the class of intended beneficiaries of the regulation, whether his injury was of a type against which the regulations are designed to protect, nor do they offer any excuse for the regulatory violation. While defendants' memorandum of law contends that there are triable issues of fact with respect to how the accident occurred, defendants have offered no evidence whatsoever addressed to this issue. This is especially problematical given that plaintiff need only prove that the defendants' negligence played some part, "no matter how slight," (*Wuestewald v Foss Maritime Co.*, 319 F Supp 2d at 1007) in causing plaintiff's injuries. It is therefore deter-

mined that defendants have failed to raise any triable issue of fact.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for partial summary judgment on the issue of liability under the Jones Act is hereby granted; and it is further

ORDERED, that it is determined and declared that defendants violated Coast Guard Regulation 46 CFR § 42.15-75(d), that plaintiff was a member of the class of intended beneficiaries of the regulation, that plaintiff sustained an injury of the type against which the regulation was designed to protect, that the violation was without excuse, that the violation was a contributing cause of the plaintiff's injury, that defendants were negligent per se and that any finding of comparative negligence by the plaintiff is barred.

This shall constitute the Decision and Order of the Court. All papers, including this Decision and Order, are being returned to counsel for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED.

ENTER.

Dated: April 28, 2008
Kingston, New York

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/s/ KIMBERLY A. O'CONNOR
HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated January 24, 2008; Affirmation of James Alexander Burke, Esq., dated January 23, 2008 with Exhibits A-G annexed; Affidavit of David E. Cole sworn to January 22, 2008 with Exhibits 1-5 annexed;

2. Affirmation of Kevin J. O'Donnell, Esq., dated March 3, 2008 with exhibits 2 and 3 annexed; Affidavit of Michael Russell sworn to February 29, 2008 with Exhibits A-C annexed;

3. Reply Affidavit of David E. Cole sworn to March 11, 2008 with Exhibits 6-8 annexed.

Notice of Appeal, dated August 11, 2008

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No.: 05-1712

GEORGE BROWN AND PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC AND REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the DEFENDANTS in this action, hereby appeal to the Appellate Division of the Supreme Court, Third Judicial Department, from the Decision and Order of the Supreme Court of the State of New York, County of Ulster (Hon. Kimberly A. O'Connor), dated June 12, 2008 and entered in the office of the clerk of the

Supreme Court, Ulster County on the 18th day of June 2008, and from each and every part thereof.

Dated: New York, New York
August 11, 2008

Kenny, Stearns & Zonghetti
Attorneys for Defendants

By: /s/ GINO A. ZONGHETTI
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To: Michael Kolb, Esq.
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Decision and Order of the Honorable Kimberly A. O'Connor, dated June 12, 2008, Appealed From [pp. 23a – 27a]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

Index No.: 05-1712
RJI No.: 55-05-01165

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

against

REINAUER TRANSPORTATION COMPANIES, LLC; REINAUER TRANSPORTATION COMPANIES, L.P.; THE REINAUER COMPANIES, INC.; REINAUER MARITIME COMPANY, LLC; and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

(Supreme Court, Ulster County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

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NINA POSTUPACK
ULSTER COUNTY CLERK

APPEARANCES: KENNY, STEARNS & ZONGHETTI, LLC
Attorneys for Defendants
(Joseph T. Stearns and Kevin J. O'Donnell, Esqs., of Counsel)
26 Broadway
New York, New York 10004

LARKIN, AXELROD, INGRASSIA & TETENBAUM, LLP
Attorneys for Plaintiffs
(James Alexander Burke, Esq., of Counsel)
356 Meadow Avenue
Newburgh, New York 12550

DECISION AND ORDER

O'CONNOR, J.:

This is an action for personal injuries which arises out of a fall from a permanent ladder on a seagoing barge owned and operated by the defendants. By Order of the Court (Work, J.), dated June 2, 2008, defendants have moved to renew and/or reargue the Decision and Order of this Court, dated April 28, 2008, which granted plaintiff's motion for partial summary judgment on the issue of liability on the claim made pursuant to the Jones Act (46 U.S.C.A § 310104, *formerly* 46 App. U.S.C.A. § 688), finding defendants negligent *per se* and barring any finding of comparative negligence by the plaintiff. Defendants have also moved pursuant to CPLR

2201 for a stay of the trial that is scheduled to commence on June 16, 2008 pending determination of their request for renewal and/or reargument of the plaintiff's motion for summary judgment, and to the extent that the Court's decision on the plaintiff's motion is unaltered, a stay of the trial pending the appeals the defendants have filed. Plaintiffs oppose the motion.

Initially, the Court notes that the part of defendants' application which seeks a stay of these proceedings and the trial of this matter was decided by separate Letter Decision and Order, dated June 11, 2008. Therefore, it will not be decided herein.

Defendants have sought by this application "an order granting renewal and/or reargument pursuant to CPLR 2221(d). . . ." CPLR 2221(d) sets forth the requirements on motions to reargue while CPLR 2221(e) governs motions to renew. Pursuant to CPLR 2221(e)(1), a motion to renew "shall be identified specifically as such." Furthermore, "a motion to renew must be based upon newly discovered [material facts or] evidence which existed at the time the prior motion was made, but was unknown to the party seeking renewal, along with a justifiable excuse as to why the new information was not previously submitted" (*Wahl v. Grippen*, 305 A.D.2d 707, 707 [3d Dep't 2003], citing *Carota v. Wu*, 284 A.D.2d 614, 617 [3d Dep't 2001]; *N.A.S. Partnership v. Kligerman*, 271 A.D.2d 922, 922-923 [3d Dep't 2000]; *Maines Paper & Food Serv., Inc. v. Farmington Foods, Inc.*, 233 AD.2d 595, 596 [3d Dep't 1996];

Matter of Jones v. Marcy, 135 A.D.2d 887, 888 [3d Dep't 1987]; *see also* CPLR 2221[e][2] & [3])).

Here, defendants have not only failed to specifically identify the instant application as a motion to renew, but they have also attempted to present new facts and evidence not offered on the original motion without tendering any "justifiable excuse for not initially placing such facts [and evidence] before the court" (*Barnes* v. *State*, 159 A.D.2d 753, 754 [3d Dep't 1990]). Moreover, defendants have made no showing that the new facts and evidence presented on this motion existed at the time of the original application, but were unknown to them and, therefore, not made known to the Court. "A motion for reconsideration is not a second chance to remedy inadequacies that occurred in failing to exercise due diligence in the first instance" (*Tibbits v Verizon New York, Inc.*, 40 A.D.3d 1300, 1302-1303 [3d Dep't 2007] citing *Carota v. Wu*, *supra*). Thus, if the Court were to deem the instant application a motion for renewal, the motion would be denied.

On a motion for reargument, the movant must show that the Court "overlooked or misapprehended a relevant fact or misapplied any controlling principle of law" (*Matter of Llana* v. *Town of Pittstown*, 245 A.D.2d 968, 970 [3d Dep't 1997]; *see also Matter of Smith v. Town of Plattekill*, 274 A.D.2d 900 [3d Dep't 2000]). The application "shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]), and it is not intended to offer the unsuccessful party successive opportunities to argue the very questions pre-

viously decided by the Court or to raise arguments not previously advanced on the original motion (*see Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dep't 1979]; *see also Pryor* v. *Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434,436 [2d Dep't 2005]; *Mangine v. Keller*, 182 A.D.2d 476, 477 [3d Dep't 1992]).

In the present case, the Court finds that defendants have failed to show that the Court overlooked or misapprehended any relevant facts or misapplied any controlling principle of law. As such, they do not sustain their burden on the motion. Furthermore, defendants improperly base their motion for reargument, *inter alia*, upon matters of fact and arguments not offered on the original motion. Moreover, defendants have sought to take a second bite at the apple by advancing the same unavailing arguments raised in their prior application. Under these circumstances, the motion must be denied.

Accordingly, it is hereby

ORDERED, that defendants' motion to reargue is denied. The Court adheres to its original Decision and Order, dated April 28, 2008.

This memorandum shall constitute the Decision and Order of the Court. All papers, including this Decision and Order, are being returned to counsel for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the appli-

cable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED.

ENTER.

Dated: June 12, 2008
Kingston, New York

/s/ KIMBERLY A. O'CONNOR
HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

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Papers Considered:

1. Order to Show Cause (Work, J.), dated June 2, 2008;
2. Affirmation of Kevin J. O'Donnell, Esq., dated May 30, 2008, with Exhibits 14 annexed;
3. Defendants' Memorandum of Law, dated May 30, 2008;
4. Affidavit of Joseph T. Stearns, Esq., sworn to May 30, 2008, with Exhibits A-H annexed;[1]

[1] The Court notes that this affidavit was submitted in support of defendants' application for a stay of the trial pro-

5. Affirmation of James Alexander Burke, Esq., dated June 9, 2008, with Exhibit A annexed.

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ceedings pending a determination of two appeals before the Appellate Division, one of which pertains to the Decision and Order which is the subject of this motion. However, the affidavit was incorporated by reference into this application as set forth in the defendants' memorandum of law. By a Letter Decision and Order, dated January 11, 2008, the Court denied the stay. Such Decision and Order has already been filed with the Office of the Ulster County Clerk. As the papers upon which the stay application was based were submitted in support of this application, they shall be filed herewith.

Notice of Appeal, dated November 11, 2008

Kenny, Stearns & Zonghetti
Attorneys for Defendant
26 Broadway
New York, New York 10004

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Civil Action
Index No.: 05-1712
Hon. Kimberly A. O'Connor

GEORGE BROWN,

Plaintiff(s),

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, LP, THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendant(s).

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that the DEFENDANTS hereby appeal to the Appellate Division, Third Department, from the Order of the Supreme Court of

the State of New York, County of Ulster (Hon. Christopher Cahill, J.), dated October 8, 2008 and entered on October 16, 2008 entering judgment on the July 7, 2008 jury verdict against defendants, and from each and every part thereof.

Dated: New York, New York
November 11, 2008

Kenny, Stearns & Zonghetti
Attorneys for Defendant
Reinauer Transportation Companies, LLC

By: /s/ GINO A. ZONGHETTI
Gino A. Zonghetti
26 Broadway
New York, New York 10004
(212) 422-6111

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[STAMP]
Kenny, Stearns & Zonghetti
26 Broadway
New York, New York 10004
(212) 422-6111

Judgment of the Supreme Court of the State of New York, County of Ulster, dated October 8, 2008, Appealed From [pp. 29a – 31a]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No. 05-1712

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ULSTER COUNTY CLERK

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

JUDGMENT

The issues in the above entitled action having duly come on for trial before Justice Christopher Cahill, and a jury, at a Trial Term of this court held at the courthouse thereof, located at 285 Wall Street, Kingston, New York, on June 16, 2008, and the plaintiffs having appeared by their attorney, Larkin, Axelrod, Ingrassia & Tetenbaum, LLP, and the defendants having appeared by their attorney, Kenny, Stearns & Zonghetti, and the liability of the defendants to the plaintiff George Brown having previously been determined by a Decision and Order of this Court, by the Hon. Kimberly A. O'Connor, rendered April 28, 2008, and the issue of the said plaintiff's damages having been duly tried, and a jury having rendered a verdict on July 7, 2008, in favor of the plaintiff George Brown, and against the defendants, in the sum of $257,452.00 for past loss of earnings, $1,000,000.00 for past pain and suffering, $400,000.00 for future medical expenses, $896,190.00 for future loss of earnings, and $2,500,000.00 for future pain and suffering, and the jury having further determined that the said plaintiff is entitled to recover damages for past medical bills, the amount thereof being reserved by stipulation of the parties for determination by the Court, and the Court, after due deliberation, having awarded the plaintiff George Brown damages for past medical bills in the amount of $ 28,568.42, all of the aforesaid with interest thereon from April 28, 2008, and the costs and disbursements of the

plaintiff having been duly taxed by the clerk of this court in the sum of $2,711.14,

NOW, on motion of Larkin, Axelrod, Ingrassia & Tetenbaum, LLP, attorneys for the plaintiffs, it is

ORDERED, ADJUDGED AND DECREED, that plaintiff GEORGE BROWN, residing at 17 Seneca Lane, Milton, New York 12547, do recover of the defendants REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, LP, THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC, and REINAUER MANAGEMENT COMPANY, INC., whose address is 1983 Richmond Terrace, Staten Island, New York 10302, the sum of Five million, eighty-two thousand, and two hundred and ten dollars, 42/cents------ DOLLARS ($ 5,082,210.42) together with interest thereupon from April 28, 2008 in the amount of $214,288.65, together with costs and disbursements as taxed in the sum of $2,711.14, amounting in all to the sum of $ 5,299,210.21 , and it is further

[HANDWRITTEN NOTE ON THE MARGIN IS ILLEGIBLE]

ORDERED, ADJUDGED AND DECREED, that plaintiff GEORGE BROWN have execution therefor, and it is further

ORDERED, ADJUDGED AND DECREED, that a copy of this Judgment with Notice of Entry thereof be served upon the attorney for the defendants, and it is further

ORDERED, ADJUDGED AND DECREED, that the Clerk enter Judgment accordingly.

ENTER

[HANDWRITTEN] Dated: October 8, 2008

/s/ HON. CHRISTOPHER CAHILL
HON. CHRISTOPHER CAHILL, Justice

[STAMP]
FILED
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OCT 16 2008
COPY
Nina Postupack
Ulster County Clerk

Judgment entered this 16th day of October, 2008

/s/ NINA POSTUPACK
CLERK

Decision and Order of the Honorable Kimberly A. O'Connor, dated September 6, 2007 [pp. 88a – 92a]

STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

Index No.: 05-1712
RJI No.: 55-05-01165

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC; REINAUER TRANSPORTATION COMPANIES, L.P.; THE REINAUER COMPANIES, INC.; REINAUER MARITIME COMPANY, LLC; and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

(Supreme Court, Ulster County, All Purpose Term)
(Justice Kimberly A. O'Connor, Presiding)

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ULSTER COUNTY CLERK

APPEARANCES: LARKIN, AXELROD, INGRASSIA & TETENBAUM, LLP
Attorneys for Plaintiffs
(James Alexander Burke, Esq., of Counsel)
356 Meadow Avenue
Newburgh, New York 12550

KENNY, STEARNS & ZONGHETTI, LLC
Attorneys for Defendants
(Kevin J. O'Donnell, Esq., of Counsel)
26 Broadway
New York, New York 10004

DECISION AND ORDER

O'CONNOR, J.:

This is a motion brought by plaintiffs[1] to compel defendants to reinstall the lower portion of an antenna support on the barge Reinauer 502 or to permit plaintiff to do so, to permit plaintiff to photograph and videotape the reinstalled or reattached parts in their pre-accident positions, and further to allow plaintiff to photograph and videotape approaching, ascending, and descending the ladder which is the subject of this action.

---

[1] While there are two plaintiffs in this action, Patricia Brown's cause of action is derivative. Therefore, unless otherwise noted, the word "plaintiff" shall refer to George Brown.

This is a personal injury action being prosecuted by plaintiff under theories of common law negligence as well as under the Jones Act (*see* 46 U.S.C.A. § 2101 *et seq*). Plaintiff was a barge captain who fell from the roof of the after deckhouse of the barge Reinauer 502 while he was descending a ladder comprised of a series of rungs welded to the bulkhead of the deckhouse. Apparently, plaintiff was holding on to an extension of an antenna support that was attached to the side of the ladder. Plaintiff alleges that the extension became detached from the lower support and, thereby, caused his fall. From the photographs submitted to the Court, it appears that the makeshift television antenna support was constructed out of ordinary plumbing pipes, with the extension attached to the lower support with a compression fitting or union. The lower support was affixed to the ladder rungs by sheet metal straps and u-bolts. The lower support was removed from the ladder during a substantial refitting of the barge in which a double hull was constructed. Defendants allege that the part was removed in order to preserve it. It is noted that there are no allegations of any defects in the manner in which the lower support was affixed to the ladder or any claims that the fewer support was insecure.

Plaintiff contends that defendants have engaged in spoliation of evidence by removing the support and argue that photographic and videotaped evidence of the reattached nature and location of the extension of the antenna support is necessary in order to properly place his claims before a jury.

However, applications for physical discovery in the nature of a re-enactment of an accident have consistently been denied *(see Madison v. Spancrete Mach. Corp.*, 288 A.D.2d 888, 889 [4th Dep't 2001]; *Hyde* v. *Chrysler Corp.*, 150 A.D.2d 343 [2d Dep't 1989]; *Sullivan v. New York City Transit Auth.*, 109 A.D.2d 879, 880 [2d Dep't 1985]). Furthermore, the submissions of the defendants include more than a dozen high quality photographs of the lower antenna support from many different angles. The photographs presumably depict the support in its condition at the time of the accident. It further appears that one of the primary issues in the litigation is whether the accident occurred as plaintiff contends, as the photographs do not appear to depict any significant damage to the compression fitting or union, which almost certainly would have occurred if the joint failed. Under such circumstances, protecting the pipe and union from damage or degradation appears far more important than keeping the lower support in place. As such, no sanctions are warranted for improper spoliation of evidence, even though defendants should have informed plaintiff that the support would be removed prior to its removal.[2]

Given the fact that the condition of the fitting or union is critical in this action, plaintiff cannot be allowed to actually connect the two pieces as part of his discovery due to the risk of alteration of the threads and body of the fitting or union. Any re-

[2] It is noted that the barge was in dry dock in Louisiana under the control of a third party shipbuilder at the time the lower support was removed.

enactment would be subject to numerous difficulties. Additionally, it appears that plaintiff will be able to adequately demonstrate the pre-accident condition through other means. Therefore, that portion of the motion which seeks to compel defendants to reattach or reinstall the lower support is denied.

The record also shows that plaintiff has had two opportunities to inspect the subject barge with his experts. There has been no showing of any reason why he could not have photographed or videotaped approaching, ascending, and descending the ladder in its current condition during such inspections. Moreover, to the extent that the motion could be construed as seeking authorization to videotape utilization of the reinstalled antenna extension as a support to facilitate use of the ladder, such conduct would appear to be hazardous, and would risk injury to any re-enactors and damage to the antenna extension and the fitting or union. As such, an additional inspection for photographing and videotaping is not warranted either.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an Order compelling physical discovery is, in all respects, denied.

This shall constitute the Decision and Order of the Court. All papers, including this Decision and Order, are being returned to counsel for the defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provi-

sions of that rule relating to filing, entry, and notice of entry.

SO ORDERED.

ENTER.

Dated: September 6, 2007
Kingston, New York

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ULSTER COUNTY CLERK

/s/ KIMBERLY A. O'CONNOR
HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated June 1, 2007; Affirmation of Good Faith of Michael Kolb, Esq., dated June 1, 2007; Affirmation of Michael Kolb, Esq., dated June 1, 2007, with Exhibits A-BB annexed;

2. Affirmation in Opposition of Joseph T. Stearns, Esq., dated June 7, 2007, with Exhibits A-E annexed; Affirmation of Kevin J. O'Donnell, Esq., dated June 7, 2007, with Exhibit 1 annexed;

3. Reply Affirmation of Michael Kolb, Esq., dated June 13, 2007, with Exhibit CC annexed; Affidavit of George Brown, sworn to June 13, 2007.

Exhibit H to Burke Affirmation –
Affidavit of David E. Cole,
sworn to January 22, 2008
[pp. 532a – 545a]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No. 05-1712

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

AFFIDAVIT

STATE OF TEXAS)
):ss
COUNTY OF TARRANT)

DAVID E. COLE, being duly sworn, deposes and says:

1. I am a consultant in admiralty and maritime matters, and an expert in maritime safety issues including maritime safety customs and practices and safety rules and regulations pertaining to commercial vessels. I hold a Bachelor of Science degree in Marine Transportation from the State University of New York Maritime College, New York, New York. I was a member of the United States Coast Guard for twenty years, retiring at the rank of Commander in 1987.

2. In the course of my Coast Guard career, I was trained and became fully qualified in marine inspection, marine operations, and the investigation of marine casualties. I was initially assigned to the Coast Guard Marine Inspection Office, Seattle, Washington, from 1967 to 1970, where I was first involved with the inspection of ocean-going and inland manned and unmanned barges. From 1970 to 1972, I was operations officer and navigator, responsible for all aspects of operations, on the U.S. Coast Guard Cutter Klamath, which made numerous patrols throughout the North Pacific Ocean. From 1972 to 1975 I was Senior Investigation Officer and Hull Inspector for the U.S. Coast Guard Inspection Office, New York, New York, and was responsible for inspecting all types of ocean-going vessels and tank barges to ensure compliance

with United States and foreign safety regulations. From 1975 to 1978, I was assigned to the Coast Guard Marine Safety Office at Huntington, West Virginia, where I was assigned as Executive Officer, Senior Inspector, and Alternate Officer-in-Charge, Marine Inspection (OCMI). In this capacity, my duties were to conduct and supervise all vessel inspections, and see to the preparation and issue of Certificates of Inspection. From 1978 to 1982 I was the Chief of Commercial Vessel Safety in the Second Coast Guard District, St. Louis, Missouri. My duties were to oversee the inspection and certification of vessels by nine OCMI's within the district, hence this position required knowledge and application of Coast Guard regulations and policies pertaining to inspection of all commercial vessels. From 1982 to 1986 I was Senior Investigating Officer for the U.S. Coast Guard Marine Inspection Office, New Orleans, Louisiana, responsible for all investigations of marine casualties and acts of misconduct, negligence, incompetence and violation of law by marine industry personnel. In 1986-1987, I was the District Hearing Officer for the 8th Coast Guard District, New Orleans, Louisiana, and was responsible for assessing civil penalties for violations of law or regulation by all segments of the United States and foreign marine industry. This position required knowledge of all applicable provisions of the United States Code and the Code of Federal Regulations, and awareness of current trends and conditions within the marine community.

3. Since 1989, I have served as a consultant in admiralty and marine matters to the marine industry as well as to law firms and insurance companies. I have been qualified as an expert in marine safety in both federal and state courts. A copy of my curriculum vitae is annexed as Exhibit "1".

4. I have been retained as an expert in the above entitled case for plaintiffs George and Patricia Brown. The matters addressed in this affidavit are based upon my review of the deposition transcripts, exhibits and written discovery in this case; my personal inspection of the barge RTC 502 and its equipment, including the deckhouse ladder, the beige support pipe, and the black pole; my review of photographs of the barge, the beige pipe and black pole; my expert knowledge, training and experience with regard to maritime safety customs and practices and Coast Guard rules, regulations and practices; and my review of standards, sources and practices concerning fixed ladders. The facts stated herein are true to the best of my knowledge. The opinions stated herein are true to a reasonable degree of certainty.

3. For the reasons shown hereinbelow, it is my opinion, to a reasonable degree of certainty, that (1) the defendant Reinauer Transportation Companies, LLC, the owner of the barge RTC 502, violated Coast Guard Regulation 46 CFR 42.15-75(d); (2) the plaintiff George Brown was a member of the class of intended beneficiaries of this regulation; (3) Mr. Brown sustained an injury of the type against which the regulation was designed to pro-

tect; (4) the defendant Reinauer's violation of 46 CFR 42.15-75(d) was without excuse; and (5) this regulatory violation was a contributing cause of the plaintiff's injury.

4. 46 CFR 42.15-75, entitled "Protection of the crew", provides in subdivision "d" thereof:

> Satisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel.

The defendant Reinauer violated Section 42.15-75(d). The fixed ladder attached to the deckhouse bulkhead did not provide satisfactory means for the protection of the crew in getting to and from the deckhouse roof in the necessary work of the RTC 502. Ascending and especially descending the ladder was awkward and unsafe because the grab bar did not extend to a sufficient height above the deckhouse roof, and the top rung of the ladder was too far below the edge of the roof. In addition, there was an unsafe *de facto* handrail running inside the ladder rungs on the right side of the ladder and extending above the deckhouse roof. This *de facto* handrail, consisting of a beige pipe into the top of which was fitted a black pole that formerly held an antenna, constituted a trap, for (a) the black pole, was readily accessible and available to be used as a handhold, but (b) this *de facto* handrail was unsafe in that (i) the means by which the black pole was

connected into the beige pipe was not sufficiently secure, and (ii) the connecting parts of the *de facto* handrail were negligently maintained and in a corroded state at the time of the accident.

A. Coast Guard Regulation 46 CFR 42.15-75 Applied To The RTC 502 At The Time Of Plaintiff George Brown's July 2003 Accident

5. Annexed hereto as Exhibit "2" is a copy of the defendant Reinauer's expert witness disclosure for Michael Russell, LCDR, USCG (retired). According to this disclosure (¶ 3), Mr. Russell is expected to testify that "the RTC 502 is an inspected unmanned tank barge to which 46 CFR 42.15-75(d) cited by plaintiff's expert, David Cole does not apply." Mr. Russell's report correctly notes that 46 CFR 42.20-13(c) provides that "an unmanned barge is not required to comply with Sec. 42.15-75 . . ." Nevertheless, his opinion is incorrect because, as of July 21, 2003, the date of the accident, the RTC 502 was not an "unmanned" barge. It was permissively manned for ocean and coastwise routes, and Reinauer at the time of the accident and for many years before manned the RTC 502 with a two man crew.

6. The evidence incontestably demonstrates that the RTC 502 was as of July 21, 2003 a permissively manned barge. Annexed hereto as Exhibit "3" is a true copy of the United States Coast Guard Certificate of Inspection for the RTC 502, bearing a Certification Date of November 25, 2002 and an Expiration Date of January 1, 2005. Under the sec-

tion captioned "Route Permitted and Conditions of Operation", the Certificate identifies the Route as "Oceans", and further states with regard to conditions of operation:

> ***PERMISSIVELY MANNED***
>
> Permissive manning authorized route provided restrictions on current international load line certificate are met. Certified without a navigating crew. This barge may carry 2 persons as maintenance personnel with no duties connected with the navigation of the barge. . . .

(See, Exhibit "3") The Certificate also requires lifesaving equipment for two persons; an unmanned barge would not require this. This Certificate was in effect on July 21, 2003, the date of the accident.

7. The Coast Guard distinguishes between "Oceans" and "Coastwise" routes. The "Coastwise" designation extends 20 miles offshore, and includes the situs of the plaintiff's accident, off Riverhead, New York in the Long Island Sound; the "Oceans" route is more than 20 miles offshore. Although the Certificate references only the "Oceans" route, the "permissive manning" designation in the Certificate applies to both Oceans and Coastwise routes because the vessel must necessarily proceed "Coastwise" before it reaches the "Ocean." Under the Certificate of Inspection applicable on the date of the accident, then, the RTC 502 was unquestionably a permissively manned barge. Furthermore, it is clear from the deposition testimony in this case that Reinauer operated the RTC 502 as a manned barge,

with a crew of two (captain and mate), from 1992 through the date of the accident.

8. In view of the foregoing circumstances, Coast Guard Regulation 46 CFR 42.15-75(d) unequivocally applied to the RTC 502 at the time of plaintiff George Brown's July 2003 accident.

B. Reinauer Violated 46 CFR 42.15-75

1. Section 42.15-75(d) Required Satisfactory Means For The Protection Of The Crew In Getting To And From The Deckhouse Roof In The Necessary Work Of The Vessel

9. 46 CFR 42.15-75(d), once again, states that:

> Satisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel.

The deckhouse roof was a part of the RTC 502 that was "used in the necessary work of the vessel." As both plaintiff George Brown and Reinauer employee James Russell testified, it was necessary for the crew to ascend to and descend from the deckhouse roof in order to run the fuel hose from the tug to the barge's fuel tanks when the fueling operation was performed en route. Other necessary work of the vessel also required access by the crew to items located on top of the deckhouse, including: (a) hand wheels, which operate exhaust

vents on the barge; (b) the "Christmas tree" mast (access for maintenance purposes is required); and (c) a life raft.

10. Therefore, Section 42.15-75(d) required that satisfactory means be provided for the protection of the crew of the RTC 502 in getting to and from the deckhouse roof.

2. The Fixed Ladder Attached To The Deckhouse Bulkhead Did Not Provide "Satisfactory Means . . . For The Protection Of The Crew" In Accessing The Deckhouse Roof

11. As noted, Section 42.15-75(d) required "[s]atisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) . . . for the protection of the crew" in accessing the deckhouse roof. Although ladders, handrails, and grab bars are not specifically referenced in the list of "satisfactory means" in Section 42.15-75(d), the "et cetera" following the specified items clearly indicates that this list is illustrative, not exclusive. Thus, in this instance, where the crew must access an elevated location in the necessary work of the vessel, the regulation clearly requires the provision of a satisfactory ladder for the protection of the crew, i.e., one properly designed, constructed and maintained, with all appurtenances necessary for a safe and efficient ladder.

12. For a number of reasons, the means provided for the protection of the crew in getting to and from

the deckhouse roof was not satisfactory and violated 46 CFR 42.15-75(d).

13. First, the fixed ladder attached to the deckhouse bulkhead had no handrail above the deckhouse roof, and a grab bar, affixed to the roof, that was too low to facilitate safe ascent and descent by the crew.

14. The 1992 Data Sheet of the National Safety Council entitled "Fixed Ladders and Climbing Devices" addresses safety considerations with regard to shipboard ladders. It states that

> Fixed ladders are often the only means of access to roofs, pits, silos, towers, chimneys, tanks, holds of ships, and other limited-access areas where the installation of stairs is not feasible. This data sheet discusses the hazards of ladders permanently attached to structures, and the procedures and devices necessary to avoid injury. For design requirements, refer to American National Standard A14.3–1984, *Safety Requirements for Fixed Ladders* . . . or to appropriate industry, federal, state or provincial, and local regulations.

(*Id.* ¶ 1-2) Among the listed "Design and Installation" requirements is the following:

> Fixed ladders (at least the handrails) must extend a minimum of 42 in. (107 cm) above the landings they serve. (*Id.* ¶ 16)

15. The design requirements listed by the National Safety Council are derived from ANSI

A14.3, the American National Standard for Ladders – Fixed – Safety Requirement. A copy of pertinent pages of the version current at the time of the plaintiffs accident – ANSI A14.3-2002—is annexed as Exhibit "4". The prefatory paragraphs of ANSI A14.3 state *inter alia*:

> 1.2 Scope. This standard prescribes minimum safety requirements for the design, construction, and use of fixed ladders, and sets for requirements for cages, wells, and ladder safety systems used with fixed ladders, in order to minimize personal injuries. All parts and appurtenances necessary for a safe and efficient ladder shall be considered integral parts of the design.
>
> 1.2 Purpose. The purpose of this standard is to provide safety for life, limb, and property by establishing minimum standards for the design and installation of fixed ladders.
>
> . . .
>
> 1.5.1. This standard is intended for application to the types of structures depicted and described in the standard (i.e., buildings, wells, and shafts). It sets forth the criteria (what is needed) necessary to build a fixed ladder in a certain way and manner (how to build). The standard does not contemplate special or unique (as to where and when) applications of the requirements, although individual requirements, or a combination of requirements, may apply universally.

1.5.2. This standard establishes requirements for fixed ladders in order to promote a greater degree of standardization. In cases where difficulty is encountered in complying with the standard, or where there are special service conditions, it is expected that the administrative authority will grant exceptions from the literal requirements of the standards, or will permit the use of alternative designs or features, if equivalent safety is thereby secured . . .

(Exhibit "4", ANSI A14.3-2002, ¶ 1.1, 1.2, 1.5.1, 1.5.2 [emphasis added])

16. ANSI A14.3–2002, ¶ 5.3, sets forth the substantive design requirements for the "Termination at the Top of the Ladder." It includes provisions relating *inter alia* to the height of handrails and grab bars above "the access/egress level or landing platform served by the ladder":

5.3.2 Extensions for Side-Rail Ladders.

5.3.2.1 The side rails of through or side-step ladders shall extend 3 feet 6 inches above the top of the access/egress level or landing platform served by the ladder (see Fig. 8,9, and 10). . . .

5.3.3 Extensions for Individual Rung Ladders

5.3.3.1 Individual rung ladders . . . shall be extended above the access/egress level or landing platform either by the continuation of the rung spacings as horizontal grab bars or by providing vertical grab

bars that shall have the same lateral spacing as the vertical legs of the rungs (see Fig. 10)

5.3.3.2 Grab bars shall extend at least 3 feet 6 inches above the access/egress level or landing platform served by the ladder.

17. Whereas ANSI prescribes as a minimum safety requirement handrails or grab bars extending 3 feet 6 inches above the access/egress level or platform served by the ladder (in this case, the deckhouse roof), the top of the horizontal grab bar affixed to the deckhouse roof on the RTC 502 was only seven (7) inches above the roof, i.e., nearly three feet too low. Annexed hereto as Exhibit "5" are photographs of other fixed ladders on the RTC 502 which substantially comply with ANSI 3 feet 6 inch requirement.

18. Second, the top rung of the deckhouse ladder was too far below the level of the roof. Concerning the top rung of fixed ladders, ANSI A14.3 states in pertinent part:

5.3.1 Top Step or Rung. The top of a step or rung of a ladder shall be level with the top of the access/egress level or landing platform served by the ladder (see Fig. 8, 9, and 10), except as required by 5.3.4.2 or as permitted in 6.2.1.2.

6.2.1.2 The top rung or step of the ladder shall meet the requirements specified

> in 5.3.1, except that individual rung ladders may have the top step or rung located not more than 6 inches below the top of the well or access/egress point.

Whereas ANSI prescribes as a minimum safety requirement that the top rung of the ladder be located not more than 6 inches below the access/egress point (in this case, once again, the deckhouse roof), the stepping surface of the top rung of the deckhouse ladder on the RTC 502 was 10.75 inches below the level of the roof, i.e., nearly five inches too low.

19. The cited ANSI standards are authoritative with regard to proper and safe design of fixed ladders, and relevant to a determination under 46 CFR 42.15-75(d) whether the fixed ladder in question here provided "satisfactory means . . . for the protection of the crew" in getting to and from the deckhouse roof.

20. The purpose of the cited ANSI requirements, insofar as is pertinent to the issues in this case, is to provide a safe and convenient means of mounting the ladder so as to descend from the deckhouse roof to the main deck of the barge. Handrails or vertical grab bars securely mounted to the roof and extending to the specified 3 feet 6 inch height above the roof would permit the seaman to maintain an upright posture while mounting the ladder, which enhances balance, avoids undue stress and strain, and allows for visual contact with the rungs of the ladder. A top rung located no more than

6 inches below the roof would permit the seaman, while holding onto a grab bar of the specified height, to visualize and easily reach the place where his foot must go to mount the ladder for his descent.

21. In contrast, the seaman cannot utilize the too-low horizontal grab bar attached to the top of the deckhouse in an upright bodily posture. While positioned right at the edge of the deckhouse roof, where he is vulnerable to falling, he must either kneel, crouch down or bend over to grasp the grab bar. Since, in this posture, his head is well forward of the edge of the roof, he cannot see the top rung of the ladder, nearly a foot below the edge, and must reach over the edge of the roof with his foot to feel for the rung below. This procedure is awkward and unsafe. The seaman forced to employ this procedure, as compared to the process employed where the handrails or grab bars are at a proper height, is less balanced than he would be in an upright position, must endure the stress and strain inherent in the awkward bodily position necessitated by the too-low grab bar, and is insecure because he cannot see where his foot must go to mount the ladder.

22. In view of these circumstances, it was perfectly natural and indeed practically inevitable that seamen would regard the beige support pipe / black pole structure running vertically inside the rungs of the ladder as a *de facto* handrail. It was located near where a proper handrail or vertical grab bar would have been located. Indeed, as Reinauer employee James Russell testified, "this thing [i.e., the black pole] is sticking right up beside you,

so you got to go around it, so you might—it's right there in the way and you have to hold it some kind of way or work around it somehow to get by." By grasping the black pole extending above the deckhouse roof for support, the seaman could maintain an upright position, see the top rung of the ladder as he began his descent from the deckhouse roof, and lower himself to a position from which the low horizontal grab bar might conveniently be reached. However, for the very reason that it was so readily available and accessible as a handhold, the beige support pipe / black pole structure constituted a trap, since the means by which the black pole was connected into the beige pipe was not sufficiently secure, and the connecting parts of this *de facto* handrail were negligently maintained and in a corroded state at the time of the accident. For this reason too, then, the means provided for accessing the deckhouse roof was not satisfactory for the protection of the crew and violated 46 CFR 42.15-75(d).

23. The safety concerns underlying the cited ANSI requirements are fully applicable, and are if anything exacerbated, in the marine context present here. Since the RTC 502 operates on the open sea, seamen ascending and descending the deckhouse ladder are potentially subject to destabilizing forces created by the motion of the sea, and also to the effects of inclement weather, and therefore to an enhanced risk of loss of balance and falling. It is all the more important, given these factors, that ANSI's minimum safety requirements for a safe and efficient means of ascending and descending fixed ladders be observed. Furthermore, there was

nothing about the fixed deckhouse ladder or its location that would have made it inappropriate, or unfeasible, or dangerous, to provide handrails or vertical grab bars, or a top ladder rung, positioned in accordance with the minimum safety requirements of ANSI A14.3.

24. For these reasons, the means provided for protection of the crew of the RTC 502 in getting to and from the deckhouse roof was not satisfactory and violated 46 CFR 42.15-75(d).

C. Plaintiff George Brown Was A Member Of The Class Of Intended Beneficiaries Of 46 CFR 42.15-75(d)

25. By its express terms, 46 CFR 42.15-75(d) was enacted "for the protection of the crew." In its Verified Answer, the defendant Reinauer admitted that it employed the plaintiff George Brown as a member of the crew, i.e., the captain, of the RTC 502, and that he was acting in the course and scope of his employment at the time of the accident. Hence, it is indisputable that Mr. Brown was a member of the class of intended beneficiaries of 46 CFR 42.15-75(d).

D. Plaintiff George Brown Sustained An Injury Of The Type Against Which 46 CFR 42.15-75(d) Was Designed To Protect

26. 46 CFR 42.15-75(d), once again, states that

> Satisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) shall be provided for the protection of the

> crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel.

One of the primary hazards against which Section 42.15-75(d) was designed to protect is the hazard of falling. The purpose of "guard rails" is obviously to prevent falls. Where, as here, means of "getting to and from" an elevated part of the vessel such as the deckhouse roof are required, "protection of the crew" would just as obviously entail protection against falls. George Brown's injury occurred as the result of a fall of approximately ten feet from the deckhouse roof to the main deck. Hence, it is incontrovertible that he sustained an injury of the type against which the regulation was designed to protect

E. The Defendant Reinauer's Violation Of 46 CFR 42.15-75(d) Was Without Excuse

27. As previously noted, there was nothing about the fixed deckhouse ladder or its location that would have made it inappropriate, or unfeasible, or dangerous, to provide handrails or vertical grab bars, or a top ladder rung, positioned in accordance with the minimum safety requirements of ANSI A14.3. Furthermore, there is no conceivable excuse for Reinauer's permitting the beige support pipe / black pole structure to exist where it was, and in its insecure, corroded condition: it constituted a trap, because its presence invited its use by seamen as a handhold while ascending and descending the ladder, but it was not safe for such use. Under the

circumstances, Reinauer's violation of 46 CFR 42.15-75(d) was without excuse.

F. The Regulatory Violation Was A Contributing Cause Of The Plaintiff's Injury

28. The evidence in this case clearly demonstrates that Reinauer's violation of 46 CFR 42.15-75(d) was a contributing cause of plaintiff George Brown's injury.

29. George Brown testified that he used the black pole as a handhold every time he went up or down the deckhouse ladder, that he would grab the pole with his right hand, and then "as I get my one foot down, that's when I go to reach for the second rung so I can have two hands on it." It was eminently foreseeable, for reasons stated in Paragraph 22 above, that crew members on the RTC 502 would utilize the black pole in this fashion. Mr. Brown further testified without contradiction that on the date of the accident he grabbed the pole firmly with his right hand, made sure he was centered above the ladder, and put his right foot down on the top rung of the ladder. He then went to reach for the rung that was attached to the roof. Before he could grab it, the pole broke off and he fell to the deck below.

30. Mr. Brown's testimony is confirmed by that of his fellow Reinauer employees, Abner Santiago and John McCartney. Mr. Santiago was in the captain's chair on the tug "Joanne Reinauer", and thus in a position to see Mr. Brown, at the time the accident occurred. He testified that Mr. Brown put one foot

down on the highest rung of the deck house ladder, grabbed the pipe that was sticking up by the ladder with his right hand, and then fell. The pipe that Mr. Brown had been holding was no longer attached to the vertical piece by the ladder when Mr. Santiago arrived at the scene of the accident. Tug boat captain McCartney arrived at the scene of the accident about 10 to 20 minutes after it occurred and saw George Brown lying on the deck with the broken pipe next to him. McCartney spoke with Mr. Brown, and Brown told him that "the pipe had broken, and that's how he had fallen. He had lost his balance at that point." Within an hour, Captain McCartney wrote in his Personal Log Book, "He said he grabbed the pole next to the ladder. The pole broke off, and he lost his balance and fell."

31. In view of these circumstances, the conclusion is inescapable that the breaking off of the black pole was causally related to plaintiff George Brown's fall, and hence, that Reinauer's violation of Section 42.15-75(d)—including (a) its failure to provide handrails or vertical grab bars so positioned as to provide satisfactory means for Mr. Brown's protection in descending from the deckhouse roof, and (b) its allowing the insecure black pole to be and remain in a place where it functioned as a *de facto* but decidedly unsatisfactory handrail—was a contributing cause of Mr. Brown's injury.

/s/ DAVID E. COLE
DAVID E. COLE

Sworn to before me this
22nd day of January, 2008.

/s/ DEBBIE CLAYDON
Notary Public

[STAMP]
DEBBIE CLAYDON
MY COMMISSION EXPIRES
DECEMBER 17, 2011

Exhibit 1 to O'Donnell Affirmation –
Affidavit of Michael Russell,
sworn to February 29, 2008
[pp. 581a – 585a]

Kenny, Stearns & Zonghetti
Attorneys for Defendant
26 Broadway
New York, New York 10004

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Civil Action
Index No.: 05-1712
Hon. Kimberly A. O'Connor

GEORGE BROWN,

Plaintiff(s),

—against—

REINAUER TRANSPORTATION COMPANIES, LLC,

Defendant(s).

AFFIDAVIT OF MICHAEL RUSSELL

STATE OF TEXAS)
)ss.:
COUNTY OF HARRIS)

MICHAEL RUSSELL, being duly sworn, deposes and says as follows:

1. I am a retired Lieutenant Commander, United States Coast Guard. I have been retained by defendant Reinauer Transportation Companies, LLC in this matter as its expert in the field of federal maritime safety regulations and customs and practices. I make this affidavit in support of defendant's opposition to plaintiff's motion for partial summary judgment seeking a declaration that the after deckhouse ladder aboard defendant's barge the RTC 502 violated 46 CFR 42.15-75(d).

2. I am a maritime safety consultant with over 32 years experience in the field of marine safety and compliance with the United States Coast Guard and in the private maritime industry. I hold a bachelors of science degree from Lamar University, Beaumont, Texas. I also attended U.S. Coast Guard Officer Candidate School in Yorktown, Virginia. I am a member of the International Association of Marine Investigators and the Nautical Institute. I am also an Inspector with the Oil Companies International Marine Forum.

3. Throughout my career with the U.S. Coast Guard I was trained and became fully certified in various areas relevant to this matter, including but not limited to marine casualty investigations, barge and tag inspections and petroleum tankship operations and inspections.

4. Between 1982 and 1986 I was assigned to serve as Chief, Vessel Inspection Division of the U.S. Coast Guard Marine Safety Office in Corpus Christi, Texas. In this capacity I was responsible for coordinating and reviewing equipment and systems inspections procedures for a fleet for over 140 U.S. vessels for compliance with U.S. and international laws. Between 1986 and 1990 I was assigned to serve as Chief, Inspections and Investigations Department of the U.S. Coast Guard Marine Safety Office Galveston, Texas. In this assignment I was responsible for supervising a staff of 15 charged with ensuring U.S. and foreign flagged vessels complied with U.S. and International inspection and casualty reporting regulations. In 1990 I was assigned to serve as Chief and Senior Investigating Officer of the Investigations Department of the U.S. Coast Guard Marine Safety Office, Houston, Texas. During my tenure in this position I investigated and reviewed over 700 maritime casualty cases.

5. Since retiring from the U.S. Coast Guard in 1995 I have been employed as a maritime consultant serving the maritime industry, law firms and insurance companies. I have been qualified as an expert witness in federal and state courts, and

have provided expert testimony on federal and state regulations bearing on the maritime industry, and the petroleum tug and barge fleet specifically.

6. For the reasons set forth below, it is my professional opinion, to a reasonable degree of certainty, that the after deckhouse ladder aboard the RTC 502, which is the subject of this lawsuit, fully complied with all applicable regulations.

46 CFR 42.15-75(d) Is Inapplicable to Barge RTC 502

7. Plaintiffs expert, David E. Cole, bases his opinion that Reinauer was negligent *per se* on his perception that the configuration of RTC 502's after deckhouse ladder violated 46 CFR 42.15-75(d), which provides:

> Satisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel."

8. Mr. Cole's analysis in this regard is mistaken. Subpart(c) of 46 CFR 42.20-13 entitled "Vessels without means of propulsion" expressly exempts unmanned barges from the requirements of § 42.15-75.

9. RTC 502 is an unmanned barge. While Mr. Cole correctly points out that the Certificate of Inspection for the RTC 502 bears the words "Per-

missively Manned" under the heading "Route Permitted and Conditions of Operation," he improperly infers that this necessarily means the RTC 502 is not "unmanned" for purposes of 46 CFR 42.20-13(c).

10. In response to a question posed during the notice and comment period for 46 CFR 32 entitled "Emergency Control Measure for Tank Barges," the U.S. Coast Guard clarified the meaning of the term "permissively manned" as follows:

> "The Officer in Charge of Marine Inspections [OCMI] exercises authority delegated by the Secretary to determine whether a barge should be manned. The decision depends on safety considerations. *Maintenance persons with no duties related to the navigation of the vessel may be permitted by the OCMI without, in effect, increasing the manning of the barge.*" 63 FR 71754, 71759 (Exhibit A).

11. The "unmanned" designation is the default position for barges under the scheme of federal regulations. As the Coast Guard has made clear, the OCMI's discretionary allowance of maintenance personnel to "ride" a barge between ports of loading and discharge does not "increase the manning of the barge." Plaintiff and the other crew members who work on the RTC 502 are maintenance personnel with no navigational duties. Therefore, the RTC 502 is an "unmanned" barge, which 46 CFR 42.20-13(c) exempts from the requirements of 46 CFR 42.15-75(d).

12. Even if 42 CFR 42.15-75(d) applied to the RTC 502, which it does not, in my professional opinion, the fixed, individual rung ladder affixed to the after deckhouse bulkhead of the RTC 502 is suitable for its intended purpose of providing access, as needed, to the deckhouse roof, and therefore is in all regards compliant with the requirements of that section.

ANSI A14.3 Is Inapplicable to The RTC 502

13. Title 1 Part 51 of the Code of Federal Regulations sets forth the procedure whereby provisions from extrinsic publications may be incorporated by reference into specific sections of the federal code. § 51.1(a) states:

> Section 552(a) of title 5 of the United States Code, provides, in pertinent part, that "matter reasonably available to the class of persons affected thereby is deemed published in the FEDERAL REGISTER when incorporated by reference therein with the approval of the director of the Federal Register." (Exhibit B).

14. 29 CFR 1915.156 entitled "Foot Protection" is an example of a CFR section that has incorporated an ANSI provision by reference. Subsection (b) of that section provides, in pertinent part:

> (1) Protective footwear purchased after August 22, 1996, shall comply with ANSI Z41-1991, "American National Standard for Personal Protection–Protective Footwear," which is incorporated by reference as specified in § 1915.5, or

shall be demonstrated by the employer to be equally effective." (Exhibit C).

15. Mr. Cole asserts that ANSI A14.3 pertaining to fixed ladders is "fully applicable . . . in the marine context present here." (Cole Aff. ¶ 23). Again, his analysis in this regard is incorrect. 46 CFR 42.15-75, which, as stated above does not apply in this context, contains no statement of incorporation pursuant to 1 CFR 51. Therefore, ANSI A14.3 is inapplicable to the RTC 502.

/s/ MICHAEL RUSSELL
Michael Russell

Sworn to before me this
29th day of February, 2008.

/s/ VORGIE COSEY Notary Public

[STAMP]
VORGIE COSEY
Notary Public
STATE OF TEXAS
My Comm. Exp. Nov. 16, 2011

**Exhibit A to Russell Affidavit—
Excerpts from Rules and Regulations,
Department of Transportation entitled
"Emergency Control Measures
for Tank Barges," 63 FR 71754
[pp. 586a – 587a]**

RULES and REGULATIONS
DEPARTMENT OF TRANSPORTATION
Coast Guard
33 CFR Part 155
46 CFR Part 32
(USCG 1998-4443)
RIN 2115-AF65
Emergency Control Measures for Tank Barges
Wednesday, December 30, 1998

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*71754 AGENCY: Coast Guard, DOT.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule implements measures for maintaining or regaining control of a tank barge that will reduce the likelihood of a tank barge's grounding and spilling its cargo. These measures are necessary because without them a tug that loses its tow lacks ready means for regaining control of it.

DATES: This interim rule is effective March 30, 1999 except for 33 CFR 155.230(b)(l) and 46 CFR 32.15-15(e), which are effective on December 11, 2000. The incorporation by reference of certain publications listed in the rule is *71755 approved by the Director of the Federal Register as of March 30, 1999. Comments must reach the Docket Management Facility on or before March 30, 1999.

ADDRESSES: You may mail your comments to the Docket Management Facility (USCG–1998–4443), U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington DC 20590-0001, or deliver them to room PL–401 on the Plaza level of the Nassif Building at the same address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

The Docket Management Facility maintains the public docket for this rulemaking. Comments and documents, as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room PL–401 on the Plaza level of the Nassif Building at the same address between 10 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also access this docket

Exhibit A

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believe having all of their crew trained and familiar with the emergency barge control system also enhances safety.

12. Two comments recommended that all barges (non-self-propelled tank vessels), including unmanned barges, carrying oil or other hazardous cargoes between ports must be equipped with working anchoring systems. We partly agree with this assessment. We are requiring anchoring systems on all single-hull tank barges operating either offshore or on the waters specified in 33 CFR 155.230(a).

13. One comment supported the Coast Guard's determination that the high seas and territorial seas as defined in 33 CFR part 2 would be equivalent to the statutory concepts of open ocean and coastal waters respectively for the applicability of the proposed rules. We partly agree; this interim rule applies on the territorial seas as defined in 33 CFR part 2, and on the 9-mile band of "open ocean" or high seas adjacent to the seaward boundary of the territorial seas of the U.S.

14. One comment questioned the definition of a permissively manned barge. It asked if the operator of a barge deemed it necessary that persons should be placed on a barge for its operation, whether the added complement would count as the

barge's required manning. This comment also asked how the provisional authority of the OCMI differs from the statement of the Secretary regarding the necessary complement. The OCMI exercises authority delegated by the Secretary to determine whether a barge should be manned. The decision depends on safety considerations. Maintenance persons with no duties related to the navigation of the vessel may be permitted by the OCMI without, in effect, increasing the manning of the barge.

15. One comment suggested that the proposed rules were not clear in distinguishing between tank vessels and Oil Spill Response Vessels (OSRVs). It asked that we clarify this in a later rulemaking. We do not see the need, as OSRVs are not tank barges, and section 155.230 makes clear that this interim rule applies to tank barges and vessels towing them on the waters listed.

16. One comment stated that, unlike Rhode Island law, the proposed rules would not require tug escorts, or provide any incentive to accelerate the phase-in of double hulls scheduled for the Northeast. These issues are outside the scope of this rule; however, they are addressed in the regional rulemaking for the waters of the Northeast, published in the Federal Register on October 13, 1998 (63 FR 54639). The report of the RRAT recommends that we require twin screws and twin engines for most vessels towing tank barges. For single-screw towing vessels, it recommends that we require tug escort or assist. Owners of double-hull tank barges need not install anchoring systems,

whereas owners of single-hull tank barges must install them to operate on the waters specified in this interim rule. While this rule may have the effect of providing an incentive to accelerate the phase-in, it is not the intention of the Coast Guard to change the deadline for double hulls established by Congress in the Oil Pollution Act of 1990 (OPA 90).

* * *

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**Exhibit 2 to O'Donnell Affirmation—
United States Coast Guard
Certificate of Inspection
for Vessel R.T.C. 502
[pp. 590a – 593a]**

[ROUND STAMP]
[UNITED STATES COAST GUARD]

Certification Date: 25 Nov 2002
Expiration Date: 01 Jan 2005
IMO Number:

United States of America
Department of Transportation
United States Coast Guard

Certificate of Inspection

Vessel Name	Official Number	Call Sign	Service
R.T.C. 502	571533	WYH8162	Tank Barge
Hauling Port	**Hull Material**	**Horsepower**	**Propulsion**
NEW YORK NY	Steel	0	None
Place Port	**Delivery Date**	**Date Keel Laid**	
HOUSTON TX, UNITED STATES	12Dec1978		

Gross Tons	Net Tons	DWT	Length
R-7912	R-7912		R-376
-	-		-

Owner	Operator
REINAUER TRANSPORTATION COMPANIES LLC	REINAUER TRANSPORTATION COMPANIES LLC
1983 RICHMOND TERRACE	1983 RICHMOND TERRACE
STATEN ISLAND, NY 10302	STATEN ISLAND, NY 10302
UNITED STATES	UNITED STATES

This vessel must be manned with the following licensed and unlicensed personnel, included in which there must be 0 certified lifeboatmen, 0 certified tankerman, 0 HSC type rating, and 0 GMOSS Operators.

Master	Master & 1st Class pilot	Radio Officer(s)	Chief Engineer	OMED/ Rating
Chief Mate	Mate & 1st Class pilot	Able Seamen/ ROANW	1st Asst. Engr./ 2nd Engr.	Oilers
2nd Mate OICNW	Lic. Mate/ OICNW	Ordinary Seamen	2nd Asst. Engr./ 3rd Engr.	
3rd Mate OICNW	1st Class Pilot	Deckhands	3rd Asst. Engr. Lic. Engr.	

In addition, this vessel may carry 0 passengers, 0 other persons in crew, 0 persons in addition to crew, and no others. Total persons allowed: 0

Route Permitted and Conditions of Operation:

---Oceans---

PERMISSIVELY MANNED

PERMISSIVE MANNING AUTHORIZED ROUTE PROVIDED RESTRICTIONS ON CURRENT INTERNATIONAL LOAD LINE CERTIFICATE ARE MET. CERTIFIED WITHOUT A NAVIGATING CREW. THIS BARGE MAY CARRY 2 PERSONS AS MAINTENANCE PERSONNEL WITH NO DUTIES CONNECTED

WITH THE NAVIGATION OF THE BARGE. ALL CREWMEMBERS MUST BE IN POSSESSION OF MERCHANT MARINER DOCUMENTS. THIS VESSEL MUST MEET SPECIFIC RESTRICTIONS TO ENGAGE IN A VOYAGE OF 600 NM OR GREATER. WHEN ENGAGED IN A VOYAGE OF LESS THAN 600 NM, 1 ABLE SEAMAN AND 1 ORDINARY SEAMAN ARE REQUIRED. AT LEAST ONE CREWMEMBER MUST BE CERTIFIED AS A TANKERMAN IF THE BARGE IS NOT GAS FREE.

***SEE NEXT PAGE
FOR ADDITIONAL CERTIFICATE INFORMATION***

With this inspection for Certification having been completed at NEW YORK, NY, the Officer in Charge, Marine Inspection, ACTIVITIES NEW YORK certified the vessel, in all respects, is in conformity with the applicable vessel inspection laws and the rules and regulations prescribed thereunder.

Annual/Periodic/Quarterly Reinspections

Date	Zone	A/P/Q	Signature
-	-	-	-
-	-	-	-
-	-	-	-
-	-	-	-

This certificate issued by:

/s/ C.E. BONE, CAPTAIN, U.S. COAST GUARD
Officer in Charge, Marine Inspection

ACTIVITIES NEW YORK
[ILLEGIBLE]

[ROUND STAMP]
[UNITED STATES COAST GUARD]

Department of Transportation
United States Coast Guard

Certificate of Inspection

R.T.C. 502 Page 2 of 3 Certification Date 25 Nov 2002

TOTAL PERSONS ALLOWED: 2

** OPA – 90 PHASE OUT**

ON 01 JANUARY 2005, THIS BARGE MUST MEET THE U.S. DOUBLE HULL DESIGN STANDARDS OF 33 CFR 157.10(d).

___Hull Exams___

Exam Type	Next Exam	Last Exam	Prior Exam
Drydock	30Sep2003	17Aug2001	30Sep1996
Internal structure	30Sep2003	17Aug2001	30Sep1998

__Liquid/Gas/Solid Cargo Authority/Conditions__

Authorization/SEE *CONDITIONS OF CARRIAGE*

46 CFR Subchapter D Authority:
Highest Grade/A Capacity/123037 Units/Barrels

46 CFR Subchapter O Authority:
Part 151/No Part 153/No Part 154/No

Conditions of Carriage

CARGO AUTHORITY

GRADE A AND LOWER, FLAMMABLE OR COMBUSTIBLE CARGOES IDENTIFIED IN 46 CFR TABLE 30.25-1 OR 46 CFR 153 TABLE 2 AS POLLUTION CATEGORY I OR III CARGOES, AND ON DOMESTIC VOYAGES ONLY, THE FOLLOWING CATEGORY "D" NOXIOUS LIQUID SUBSTANCE(S) UNDER THE AUTHORITY OF 33 CFR 151.47:

CHEM CODE	CARGO NAME	POLLUTION CATEGORY
MBE	METHYL-TERT-BUTYL-ETHER	CAT "D"

CARGO COMPATIBILITY

PER 46 CFR 150.130, THE PERSON-IN-CHARGE OF THE BARGE IS RESPONSIBLE FOR ENSURING THAT THE COMPATIBILITY REQUIREMENTS OF 46 CFR 150 ARE MET.

VAPOR CONTROL AUTHORITY

IN ACCORDANCE WITH TITLE 46 CFR 39, EXCLUDING SUBPART 39.40, THIS BARGE'S VAPOR COLLECTION SYSTEM HAS BEEN INSPECTED TO THE PLANS APPROVED BY THE MARINE SAFETY CENTER LETTER #MC-10025 DATED 18 JANUARY 1991, AND FOUND ACCEPTABLE FOR THE COLLECTION OF THOSE SPECIFIC CARGO VAPORS LISTED.

MARPOL 1 DESIGNATION

THIS BARGE HAS BEEN DESIGNATED AS A PRODUCT CARRIER PER ANNEX 1 OF MARPOL 73/78.

MARPOL 1 PROHIBITION

ALL BALLAST, TANK MACHINES & OTHER RESIDUAL MATTER SHALL BE DISCHARGED DIRECTLY TO A SHORE-SIDE RECEIVING FACILITY OR A TANK VESSEL THAT COMPLIES WITH THE REQUIREMENTS OF 33 CFR 157.11 & 157.15.

MARPOL ANNEX II PROHIBITION

THIS BARGE MAY ONLY CARRY THOSE SPECIFIED CATEGORY "2" NOXIOUS LIQUID SUBSTANCES (NLS) CARGOES, AS ENDORSED UNDER THE — CARGO AUTHORITY — SECTION ABOVE, ON DOMESTIC VOYAGES. THIS BARGE MAY NOT CARRY ANY OTHER CARGOES THAT ARE DESIGNATED AS NLS IN TABLE 30.25-1 OF 46 CFR 30.28, 33 CFR 151.47 AND 33 CFR 151.49. NO CARGO BANK CONTAINING A CATEGORY "D"

[ROUND STAMP]
[UNITED STATES COAST GUARD]

Department of Transportation
United States Coast Guard

Certificate of Inspection

R.T.C. 502 Page 3 of 3 Certification Date 25 Nov 2002

NLS CARGO OR ITS RESIDUE MAY BE WASHED OR BALLASTED UNLESS THE WASH OR BALLAST WATER IS DISCHARGED TO A LICENSED RECEPTION FACILITY, DISCHARGED UNDER AN EPA OCEAN DUMPING PERMIT, OR THE WASHING OR BALLASTING TAKES PLACE AFTER THE TANK IS CLEANED FOLLOWING THE PROCEDURES IN 46 CFR 153.1128(A)(2), THE OPERATIONAL REQUIREMENTS OF 33 CFR 151.31

THROUGH 151.45 SHALL BE FOLLOWED WHEN CARRYING NLS CARGOES.

___Inspection Status___
Pressure Vessels

Type	Location	Previous	Last	Next
Air Receiver	Machinery Space	01Aug 1996	03Aug 2001	03Aug 2006

___Lifesaving Equipment___

	Number	Persons		Required
Total Equipment for		2	Life Preservers (Adult)	2
Lifeboats (Total)	0	0	Life Preservers (Child)	0
Lifeboats (Port)*	0	0	Ring Buoys (Total)	2
Lifeboats (Starbd)*	0	0	With Lights*	1
Motor Lifeboats*	0	0	With Line Attached*	1
Lifeboats W/Radio*	0	0	Other*	0
Rescue Boats/ Platforms	0	0	Immersion Suits	2
Inflatable Rafts	1	6	Portable Lifeboat Radios	0
Life Floats/ Buoyant App	0	0	Equipped with EPIRB? No	
			(* included in totals)	

___Fire Fighting Equipment___
Number of Fireman Outfits/0
*Fire Extinguishers –
Hand portable and semi-portable*

Qty	Class Type
1	A-II
5	B-II
1	B-V

END

DEPARTMENT OF
TRANSPORTATION
U.S. COAST GUARD
CG-858 (Rev. 8-74)

[STAMP]
UNITED STATES
COAST GUARD

CERTIFICATE OF INSPECTION AMENDMENT

NAME OF VESSEL	OFFICIAL NUMBER
R.T.C. 502	571538

CLASS	GROSS TONS	HOME PORT
TANK BARGE	7912	NATL VESSEL DOC CTR

WHEN AND WHERE BUILT
12DEC1976 HOUSTON, TEXAS

DATE CURRENT CERTIFICATE EXPIRES	DATE AND PLACE CURRENT CERTIFICATE OF INSPECTION ISSUED
01JAN2005	25NOV2002 NYCMI

The Certificate of Inspection issued to the vessel described above is amended as follows:

COMPLETED CREDIT DRYDOCK AND INTERNAL STRUCTURAL EXAMS.

EXAM TYPE	NEXT EXAM	LAST EXAM	PRIOR EXAM
DRYDOCK	01JAN2005	16SEP2003	17AUG2001
INTERNAL STRUCTURAL	01JAN2005	16SEP2003	17AUG2001
CARGO TANK INTERNAL	01JAN2005	16SEP2003	17AUG2001

This/these amendments shall automatically appear on the next COI that is issued for this vessel. Please attach this form to the current COI for reference by any concerned parties.

DATE OF ISSUE	INSPECTION ZONE	OFFICER IN CHARGE, MARINE INSPECTION
16SEP2003	NEW YORK, NY	J.E. CAMERON USCG, BY DIRECTION

INSTRUCTIONS

1. This amendment shall be issued to authorize changes to the conditions or particulars entered on a current valid Certificate of Inspection (Form CG-841 or CG-3753) or to the conditions or particulars entered on a current valid amendment to such a Certificate of Inspection. When issued it shall become part of the Certificate of Inspection which it amends.
2. The original of this amendment shall be delivered to the master or owner of the vessel named herein and must be framed under glass with or near the vessel's Certificate of Inspection. If the Certificate of Inspection is not required to be posted, this amendment must be kept on board with the Certificate of Inspection and shown on demand.
3. One copy of this amendment shall be filed in the office of the issuing Officer In Charge, Marine Inspection. In addition, one copy shall be distributed to each of the following:
   a. The Officer In Charge, Marine Inspection who issued the current Certificate of Inspection.
   b. The Commandant (G-MPS).
   c. The owner or agent of the vessel named herein.

Reply Affidavit of David E. Cole, for Plaintiffs, In Further Support of Motion, sworn to March 11, 2008 [pp. 596a – 604a]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No. 05-1712

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

REPLY AFFIDAVIT

STATE OF TEXAS)
):ss
COUNTY OF TARRANT)

DAVID E. COLE, being duly sworn, deposes and says:

1. I am the plaintiffs' expert in maritime safety issues including maritime safety customs and practices and safety rules and regulations pertaining to commercial vessels. I submit this reply affidavit to supplement my January 22, 2008 affidavit in this matter, and to reply to the February 29, 2008 affidavit in opposition of defense expert Michael Russell.

A. Plaintiff George Brown Was A Member Of The Crew Of A Manned Barge, And Incontestably Entitled To The Protection Of 46 CFR 42.15-75(d)

2. My original affidavit demonstrated that (1) the United States Coast Guard Certificate of Inspection applicable on the date of the accident designated the RTC 502 as a "permissively manned" barge, (2) the defendant Reinauer chose to operate the RTC 502 as a manned barge, with a crew of two (captain and mate), from 1992 through the date of the accident, and accordingly, (3) Reinauer was obligated to comply with 46 CFR 42.15-75(d), which by its express terms was enacted "for the protection of the crew."

3. In the face of this demonstration, defense expert Russell erroneously claims that the RTC 502 was an "unmanned" barge and hence, under 46 CFR 42.20-13, exempt from the requirements of 46 CFR 42.15-75(d). (*See*, Russell Aff., ¶ 18-11)

4. In support of this claim, Russell proffers the vague and unsubstantiated assertion that "[t]he 'unmanned' designation is the default position for barges under the scheme of federal regulations." (Russell Aff., ¶ 11) The meaning of this statement cannot be ascertained from Russell's affidavit. However, if Russell means to say that a barge is deemed "unmanned" for purposes of 46 CFR 42.20-13 unless the Coast Guard *requires* it to be manned—and in spite of the fact that it is *permissively* manned by the barge's operator—there is nothing in the Coast Guard regulations to support that assertion, and Russell provides no support in this affidavit.

5. The terms "manned" and "unmanned" are not explicitly defined in the Coast Guard regulations. However, both Coast Guard practice and the defendant Reinauer's own practice clearly show that a "permissively manned" barge is a "manned" barge, not an "unmanned" barge.

6. Annexed hereto as Exhibit "6" is a true copy of pages B4-28 and B4-29 of the May 21, 2000 revision of the United States Coast Guard Marine Safely Manual. These pages are from the USCG Marine Safety Manual, Volume II (Materiel Inspection), Section B (Domestic Inspection Programs), Chapter 4 (Inspection Procedures Applicable to Vessel Types, Classes and Categories), Subdivision E (Seagoing Barges). Subsection 2(e) thereof discusses "Manning requirements" and "Permit Manning", and states:

> "When seagoing barges are manned, **whether manning is required or permitted**, the requirements of 46 CFR 94 [concerning lifesaving equipment] apply . . ."

The language of the Manual clearly indicates that the Coast Guard regards a "permissively manned" barge as a "manned" barge.

7. Indeed, the defendant Reinauer itself treated the RTC 502 as a "manned" barge subject to the requirements of 46 CFR 42.15-75(d). Annexed hereto as Exhibit "7" is a true copy of Reinauer's June 13, 2006 "Response to Plaintiff's Notice to Produce", together with pertinent portions of documents produced by Reinauer in response to Item No. 6, which sought "records of any inspections of the subject barge that were performed by the Quality Assurance department of the defendants, or by anyone else on behalf of the defendants—during the period from December 21, 2000 through December 31, 2003." The inspection reports unequivocally indicate that Reinauer inspected the RTC 502's "guards", "ladders", "rails", "gangways" and "lifelines" for compliance with 46 CFR 42.15-75.[1] Thus, consistent with Coast Guard practice, the defendant Reinauer itself treated the "permissively manned" RTC 502 as "manned" for purposes of Section 42.14-75(d).

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[1] These inspections were also made for compliance with 46 CFR 32.02-10, 46 CFR 92.25, which do not concern ladders, and ICLL 66 Reg. 25. (*See*, Exhibit "7") "ICLL 66" refers to the International Convention on Load Lines, 1966, to which the United States is a signatory. The language of Regulation 25(4) thereof is identical to 46 CFR 42.15-75(d).

8. Defense expert Russell's opinion to the contrary rests on his misinterpretation of a misleadingly truncated quotation from a response to a question posed during the notice and comment period for 46 CFR 32, a regulation, irrelevant to the matter at hand, concerning safety measures designed to prevent tank barge oil spills. (*See,* Russell Aff., ¶ 10-11)

9. A complete copy of the document Russell quotes is annexed as Exhibit "8". The entire paragraph from which Russell's quote is extracted reads as follows:

> 14. One comment questioned the definition of a permissively manned barge. It asked if the operator of a barge deemed it necessary that persons should be placed on a barge for its operation, whether the added complement would count as **the barge's required manning.** This comment also asked how the provisional authority of the OCMI differs from the statement of the Secretary regarding the necessary complement. The OCMI exercises authority delegated by the Secretary to determine whether a barge should be manned. The decision depends on safety considerations. Maintenance persons with no duties related to the navigation of this vessel may be permitted by the OCMI without, in effect, increasing the manning of the barge.

(*See,* Exhibit "8", p. 13, ¶ 14 [emphasis added]) When the paragraph is considered in its entirety, it is

plain that Russell has misinterpreted the last sentence of the paragraph, i.e., "Maintenance persons with no duties related to the navigation of the vessel may be permitted by the OCMI without, in effect, increasing the manning of the barge."

10. Russell treats the language "without, in effect, increasing the manning of the barge" as if it read, "without converting an unmanned barge to a manned barge." Russell's interpretation not only ignores the literal meaning of the words; it ignores a *context* which makes his interpretation quite frankly impossible. The question to which the Coast Guard was responding (which Russell omitted) concerned a barge with "required manning", that is, a barge the Coast Guard had required to be manned, not a "permissively manned" barge. (*See,* boldface portion of block quote above) In context, the Coast Guard's response is properly interpreted, in accordance with the literal meaning of the words employed, to mean that maintenance persons with no duties related to navigation do not increase the required manning of the barge. The response has nothing to do with the very different question whether a "permissively manned" barge is a "manned" barge. This question was neither posed by the questioner nor addressed by the Coast Guard in the document cited by defense expert Russell.

11. The incomprehensibility of defense expert Russell's position is underlined by his utter failure to provide any meaningful foundation for the conclusion that a safety regulation expressly enacted

for the "protection of the crew" does not apply to crew members involved with the maintenance of the vessel. By its express terms, 46 CFR 42.15 75(d) was enacted "for the protection of the crew", and maintenance personnel no less than navigational personnel are crew members entitled to the benefit of the safety measures it requires. 46 CFR 42.20-13 exempts "unmanned" barges from compliance with Section 42.15-75(d) only because there is no crew on an unmanned barge. There is no basis in law or in reason for the suggestion, tendered by defense expert Russell, that Section 42.20-13 deprives maintenance crew members of the protection afforded by Section 42.15-75(d).

12. Plaintiff George Brown, as Reinauer admitted in its Verified Answer, was a member of the crew, i.e., the captain, of the RTC 502. He was employed on the RTC 502 as a member of the crew because Reinauer elected to operate the vessel as a permissively "manned" barge. Under these circumstances, Reinauer was incontrovertibly required to comply with 46 CFR 42.15-75(d).

B. My Expert Opinion That The Defendant Reinauer Violated 46 CFR 42.15-75(d) Was Properly Based *Inter Alia* On A Consideration Of The Safety Concerns Underlying ANSI A14.3

13. Defense expert Russell's argument with respect to ANSI A14.3, the American National Standard for Ladders – Fixed – Safety Requirement, is also based on a misleadingly truncated quotation, this

time from my own expert affidavit (*See*, Russell Aff. ¶ 13-15)

14. Contrary to Mr. Russell's assertion (*Id.*, ¶ 15), my January 22, 2008 affidavit does not state that "ANSI A14.3 pertaining to fixed ladders is 'fully applicable . . . in the marine context present here.'" Russell has misrepresented my position. What my affidavit does state is:

> 19. The cited ANSI standards are authoritative with regard to proper and safe design of fixed ladders, and **relevant to a determination** under 46 CFR 42.15-75(d) whether the fixed ladder in question here provided "satisfactory means . . . for the protection of the crew" in getting to and from the deckhouse roof.
>
> . . . .
>
> 23. The **safety concerns underlying the c ted ANSI requirements are fully applicable**, and are if anything exacerbated, in the marine context present here. . . .

(Cole Affidavit of 1/22/08, ¶ 19, 23 [emphasis added]) I never stated that ANSI A14.3 itself is fully applicable to the RTC 502; nor did I ever state that Reinauer was negligent *per se* because it violated ANSI.

15. My affidavit first stated, in summary form, my opinion that Reinauer violated Section 42.15-745(d) and the grounds therefor.

> The defendant Reinauer violated Section 42.15-75(d). The fixed ladder attached to the deckhouse bulkhead did not provide satisfactory means for the protection of the crew in getting to and from the deckhouse roof in the necessary work of the RTC 502. Ascending and especially descending the ladder was awkward and unsafe because the grab bar did not extend to a sufficient height above the deckhouse roof, and the top rung of the ladder was too far below the edge of the roof. In addition, there was an unsafe *de facto* handrail running inside the ladder rungs on the right side of the ladder and extending above the deckhouse roof. This *de facto* handrail, consisting of a beige pipe into the top of which was fitted a black pole that formerly held an antenna, constituted a trap, for (a) the black pole was readily accessible and available to be used as a handhold, but (b)this *de facto* handrail was unsafe in that (i) the means by which the black pole was connected into the beige pipe was not sufficiently secure, and (ii) the connecting parts of the *de facto* handrail were negligently maintained and in a corroded state at the time of the accident.

(Cole Affidavit of 1/22/08, ¶ 4) Defense expert Russell's affidavit does not challenge or even so much as address my opinions that

> [a]scending and especially descending the ladder was awkward and unsafe because the grab bar did not extend to a sufficient height above

> the deckhouse roof, and the top rung of the ladder was too far below the edge of the roof

and that

> there was an unsafe *de facto* handrail running inside the ladder rungs on the right side of the ladder and extending above the deckhouse roof. This *de facto* handrail, consisting of a beige pipe into the top of which was fitted a black pole that formerly held an antenna, constituted a trap . . ."

16. I proceeded to demonstrate, based on the language of Section 42.15-75(d), that the regulation required the provision of a satisfactory ladder:

> . . . in this instance, where the crew must access an elevated location in the necessary work of the vessel, the regulation clearly requires the provision of a satisfactory ladder for the protection of the crew, i.e., one properly designed, constructed and maintained, with all appurtenances necessary for a sale and efficient ladder.

(Cole Affidavit of 1/22/08, ¶ 11) Defense *counsel* suggests that Section 42.15-75(d) does not apply to ladders, but he is not supported even by his own expert: defense expert Russell's affidavit does not challenge or even so much as address my opinion that Section 42.15-75(d) required the provision of a satisfactory ladder.

17. Next, I referenced multiple sources, including the 1992 Data Sheet of the National Safety Council

entitled "Fixed Ladders and Climbing Devices" and ANSI A14.3, regarding safety considerations pertaining to fixed ladders. (Cole Affidavit of 1/22/08, ¶ 14-18)

18. With regard to ANSI A14.3, I did not merely demonstrate that Reinauer had violated specific ANSI requirements pertaining to handrails/grab bars and ladder rungs. I made an *unrefuted* demonstration that:

(A) ANSI A14.3 is authoritative with regard to proper and safe design of fixed ladders. (Cole Affidavit of 1/22/08, ¶ 19)

(B) The safety concerns underlying the cited ANSI requirements are fully applicable and are if anything exacerbated, in the marine context present here. Since the RTC 502 operates on the open sea, seamen ascending and descending the deckhouse ladder are potentially subject to destabilizing forces created by the motion of the sea, and also to the effects of inclement weather, and therefore to an enhanced risk of loss of balance and falling. (Id., ¶ 23)

(C) There was nothing about the fixed deckhouse ladder or its location that would have made it inappropriate, or unfeasible, or dangerous, to provide handrails or vertical grab bars, or a top ladder rung, positioned in accordance with ANSI safety requirements. (Id., ¶ 23)

(D) Under the circumstances, ANSI A14.3 is relevant to a determination under 46 CFR 42.15-75(d) whether the fixed ladder in question here provided "satisfactory means . . . for the protection of the crew" in getting to and from the deckhouse roof. (Id., ¶ 19)

(E) The purpose of ANSI A14.3 is "to provide safety for life, limb, and property by establishing **minimum** standards for the design and installation of fixed ladders." (Id., ¶ 15)

(F) There was not just a technical violation of the cited ANSI requirements pertaining to handrails/grab bars and ladder rungs. The height of the horizontal grab bar affixed to the deckhouse roof was so substantially below the ANSI requirement (Id., ¶ 16-17), and the distance of the top rang of the ladder below the level of the roof was so substantially greater than allowed by ANSI A14.3 (Id., ¶ 18), that the deckhouse ladder failed of its fundamental purpose of providing a safe and convenient means of mounting the ladder so as to descend from the deckhouse roof to the main deck of the barge. (Id., ¶ 20-22)

(G) On account of the ladder's deficiencies, seamen were forced to employ an awkward and unsafe procedure in descending from the deckhouse roof to the main deck of the barge (Id., ¶ 20-21).

(H) To avoid this, it was perfectly natural and indeed practically inevitable that seamen would regard the beige support pipe / black pole structure running vertically inside the rungs of the ladder, near where a proper handrail or vertical grab bar would have been located, as a *de facto* handrail. However, for the very reason that it was so readily available and accessible as a handhold, the beige support pipe / black pole structure constituted a trap, since the means by which the black pole was connected into the beige pipe was not sufficiently secure, and the connecting parts of this *de facto* handrail were negligently maintained and in a corroded state at the time of the accident (Id., ¶ 22)

19. Based on this detailed demonstration, and not merely on the fact that the deckhouse ladder does not comply with ANSI A14.3, I concluded that the means provided for protection of the crew of the RTC 502 in getting to and from the deckhouse roof was not satisfactory and violated 46 CFR 42.15-75(d). Defense expert Russell, in contrast, ventures only the bold, conclusory opinion that the deckhouse ladder "is suitable for its intended purpose of providing access, as needed, to the deckhouse roof, and therefore is in all regards compliant with the requirement of [Section 42.15-75(d)]." (Russell Aff., ¶ 12) There is not so much as a scintilla of evidence or argument proffered in Russell's affidavit in support of this opinion. Furthermore, Russell has not

challenged or even addressed any part of my detailed demonstration that the ladder violated Section 42.15-75(d). Russell's objection that ANSI A14.3 is not incorporated by reference in the Code of Federal Regulations is addressed not to the opinion I actually proffered, but to a misquotation and misconstruction thereof, and should accordingly be disregarded.

/s/ DAVID E. COLE
DAVID E. COLE

Sworn to before me this
11th day of March, 2008.

/s/ CHRIS GARVIN
Notary Public

[STAMP]
CHRIS GARVIN
Notary Public
STATE OF TEXAS
My Comm. Exp. 07-03-10

[2111]

Trial Transcript, dated July 3, 2008
[pp. 2111 – 2266]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No. 05-1712

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

VOLUME XIII OF XV
Ulster County Courthouse
Kingston, New York
July 3, 2008

BEFORE:

HON. CHRISTOPHER CAHILL
Supreme Court Justice

APPEARANCES:

LARKIN, AXELROD, INGRASSIA
& TETENBAUM, LLP.
Attorneys for Plaintiff
34 Route 17K
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KENNY, STEARNS & ZONGHETTI, LLC
Attorneys for Defendants
26 Broadway
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BY: JOSEPH T. STEARNS, ESQ.
KEVIN O'DONNELL, ESQ.

Donna V. Meo
Senior Court Reporter

[2112]

(The following proceedings were conducted in chambers.)

THE COURT: First thing, yesterday at the end of testimony in the trial I received an application from Mr. Stearns, the attorney for the defendant, about a phone message.

MR. STEARNS: It's a phone message from Mrs. Brown dated 6/29 with no year date but clearly in context the year 2006. It states: George saw Doctor Panero yesterday. Doctor Panero's records state he saw George 6/28/2005, that's right, 2005, and prescribed a medication and states that he, that is Doctor Panero, said that he, George Brown, has neuropathy.

THE COURT: Okay, it's my ruling it's an admission. It was an affirmative step to inform one doctor of another doctor's diagnosis. Mrs. Brown has authority to make the admission, she is plaintiff's wife and as plaintiff testified at trial, he and his wife have a close relationship, have had during the entire case so I'm going to admit it.

[2113]

As to VA records, citing from Richardson on Evidence, since it is the business of a hospital to diagnosis and treat its patients' ailments, entries made in a hospital record relevant to diagnosis or treatment qualify for admission under the statutory business records rule, including the diagnosis itself. And since the opinion and diagnosis are in my mind essentially the same thing, I will admit that. Okay.

MR. STEARNS: It's a hospital record if it is and it's covered by 4518 and 4518 says that opinions—

THE COURT: I know, but the case law says includes opinions as well. I know you had an agreement as to doctors, but with the wisdom of Solomon I have ruled on both these issues.

MR. STEARNS: The error is 4518. Now, I think that it would be the routine expected and likely conclusion of a Federal Court Judge to let in it as you ruled.

MR. TETENBAUM: We should have an understanding no exhibit after summation goes

[2114]

into the jury without us looking at it.

MR. STEARNS: I agree with that, I was going to propose it myself.

I just want to make a record regarding the court's ruling regarding requests to charge including by plaintiff.

Plaintiff's request to charge form has essentially been significant, very significantly modified, but I think there is still potential for confusion. The modification was in favor of defendant's argument that the law wouldn't permit the charge they requested to be given. I am still concerned about the second and third sentences, you must therefore decide whether or not such negligence caused in whole or in part any injury or damages suffered by the plaintiff. The negligence causing in whole or in part is not the point in this case because the negligence rule is in whole or in part only with respect to the connection between a negligent act and the occurrence of some compensable injury and it doesn't imply in connection to an injury and damages. The rule

[2115]

of recovery of damages is that there has to be an unbroken chain of connection between the injury and the damages claimed.

This charge which the Court is going to give allows for a very large measure of confusion regarding that. The reason is it's clear that it refers to negligence causing any injury but then says or damages. The first part, negligence causing any injury, is irrelevant to the case because of the finding of liability, and the damages is not a matter of causation in whole or in part, it is a matter of unbroken chain of connection.

There is also I note a request defendants have made for charges which include a different charge on proximate cause which states that the condition from which plaintiff may have suffered or may now be suffering is not compensable by the jury unless it has been established by a preponderance of the evidence in the case that the injury or condition was proximally caused by the accident. Then it goes on to discuss foreseeable risks and the fact there are risks that are not foreseeable in

[2116]

this case.

There is factually an issue of plaintiff's dependence on narcotics. He is very heavily medicated on narcotics and the jury would be entitled to believe that's the reason for any disability he now suffers.

Also, further, plaintiff's own conduct may be a superseding force absolving the defendant from liability. That is required in a case where the jury has ample evidence to conclude the reason for George Brown's present disability is his drug dependence.

The other matter is one of so-called intervening cause or superseding cause and there has to be a continuous sequence, as is requested in defendant's proximate cause charge, uninterrupted by an efficient or independent intervening cause for damages to be recovered.

This charge for proximate cause is standard in cases such as this kind where it's clear what the damage, the injuries were and it's not at all established the consequences alleged are in fact the result of the injuries

[2117]

particularly in light of George Brown's history of alcohol abuse and his present dependence on what I believe Doctor Rapoport said or suggested was massive doses of both fast and slow release morphine sulfate, Fentanyl and Percocet. This jury has the right to believe George Brown perpetuated his disability because of his decision to substitute drug dependence for dependence on alcohol and that's a perfectly legitimate issue in this case where so much is murky that one fact may be seen by the jury as plain. There's no doubt this is at the absolute crux of the case and that the charges given don't comprehend that issue and others, and the confusion between standard of causation between some negligence and an injury which is only that and the rule is only that there is an allowance for recovery in the event even the plaintiff is 99 percent negligent. That doesn't reach at all or address the issue when an injury has happened what the damages are which depend upon proof by the plaintiff of an unbroken chain, uninterrupted by any efficient or independent intervening cause of

[2118]

which defendant is not liable. In this case, among other things, the issue of his present dependence on drugs is exactly such an issue.

The jury must, I say, without question be advised that that is not a basis for his recovery of damages. I was planning to tell the jury that the evidence pointed to the fact that George Brown was disabled because of his dependence on drugs and this charge

will at least give me second thoughts about whether I will do that. And that shouldn't be the situation that should be. I should be free to argue this, because the evidence supports it, free of any concern the jury might be confused and think they are entitled to award damages because of disability related to use of drugs when the use of drugs wasn't necessary because, for example, RSD doesn't exist, and yet they can believe, based on the charge, they can award damages. Nonetheless, that's simply wrong and could certainly be a substantial and in my opinion reversible error.

I would also note the fact I have objected on a number of occasions to the charge

[2119]

that does not require the jury to discount pain and suffering. The modern rule seems it requires that—the modern rule in this case perhaps is better and should be charged which we have submitted to the Court. That is our objection previously.

And otherwise, I object to the failure of the Court to give missing witness charges with respect to treating doctors, Doctor Stamer, Doctor Uhorchak, Doctor —I will withdraw it with respect to Panero because the admission of the telephone message because that's all I wanted from him in the beginning and plaintiff admitted that was what he was told. Otherwise the defendant objects to the failure of the Court to charge as requested in our formal requests to charge and also in the document that we served before, that one which is entitled Defendant's Objection To Plaintiff's Requests To Charge, were some requests that I have now repeated.

THE COURT: I would note at our preliminary conference the other day and in my considering the arguments raised at the

[2120]

conference afterwards, between then and today when I made my ruling I did consider your objections and I also considered your proposed charge.

MR. STEARNS: I thank you for saying this, I have given you opportunity to consider it.

MR. BURKE: James Burke for the plaintiff, in response to those arguments.

The Supreme Court has clearly held in the Jones Act cases the plaintiff bears a reduced burden on causation. As a result of a Second Circuit case, Ammar versus American Export Lines, Inc., 326 F.2d, 955, in that case the defendant contended that its negligence was a remote cause separated from plaintiff's second injury by the plaintiff's intervening negligence from the damages caused. The Second Circuit held that the reduced burden of proof on causation articulated by the Supreme Court in Rogers excludes in Jones Act cases the application of causation analysis to limit liability for remote damages.

Furthermore, the kind of language

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that the defendant has requested in his causation instructions, to wit, defendant's original liability is a proximate cause of harm if it led to the plaintiff's injury in a continuous sequence uninterrupted by a sufficient or independent intervening cause. That kind of language has been explicitly condemned by the Second Circuit in DeLima versus Trinidad Cor-

poration and also by the Fifth Circuit in Page verse St. Louis Southwestern Railroad Company.

Now, Mr. Stearns addressed the question of Mr. Brown's use of narcotics as a cause of his damages here. Now, to the extent the defendant makes that argument, it is subject to basically extraordinary intervening cause analysis. The words, causation chain can be broken only if the circumstances are extraordinary under the circumstances, unforeseeable in the normal course of events, different in kind from the foreseeable risks associated with the original negligence, or independent or far removed from defendant's conduct.

[2122]

Furthermore, to the extent that the defendant claims that Mr. Brown would have been disabled or sustained damages as a result of narcotics use or anything else, independent of the injuries he sustained as a result of his fall or from medical treatment relating thereto, under the case law the defendant bears the burden both of proving the plaintiff has such an unrelated condition like that including, for instance, he abuses narcotics, and second, he has to prove the extent of the damages that this unrelated condition would have inevitably caused. Only in that case could the jurors take that into account. If they are unable to separate the damages caused by either drug use or any or unrelated condition from the damages which plaintiff can establish were suffered as a result of RSD or any or problem associated with the fall or the medical treatment, then they have to award plaintiff all his damages. And the supporting authority

Maurer versus United States, 668 F.2d 98, 100; Ahlf versus CSX Transportation, 386 F.Supp 2d 83, 91 and a case cited in the

[2123]

defendant's papers Stevens versus Bangor and Aroostook Railroad Company, 97 F.3d 594, 601.

MR. STEARNS: If I may respond to that. Every charge in every case in deciding whether the charges are appropriate obviously doesn't make, doesn't find its way to print, doesn't become authority except in the narrow circumstances in which the charge is given. Now, there is an obligation under the Code of Professional Ethics for lawyers not to hold or encourage others to hold the Court in disrepute. What plaintiff is saying is that it would be wrong to charge a jury that a man's deliberate act, because he doesn't have the pain that he claims takes drugs, as a result disables himself, is an event and a consequence for which the jury can award him damages. If that ruling were made by any Court in any country explicitly it would make the newspaper headlines, and to suggest that on the narrow facts here of a man who may not have the pain he claims and may have gone to pain management to get drugs if the jury believes that can get damages because he is as a result disabled is

[2124]

an interpretation of the law that tends to hold the Court system in disrepute.

Look, I would like the record—

THE COURT: Obviously it's not my ruling I have made today, it's certainly not my intent, but in any event I know what you are saying.

MR. STEARNS: What I am saying is this.

MR. TETENBAUM: Instead of you repeating yourself, can we put our position on the record?

MR. STEARNS: I will finish. I am not suggesting there has been any such ruling here. I am dealing with the argument that's been made and what seems to be Mr. Burke's inability to see the connection between the words he is using to urge the Court to charge something it shouldn't and the consequences. It is absurd to suggest any Court in this country would sponsor the idea that a man who complains of pain to get drugs and as a result disables himself when he doesn't need the drugs for pain can get damages.

[2125]

MR. BURKE: Again, that's not my position. I stand by the words that are already on the record.

MR. TETENBAUM: I have to say one thing. If he starts going into this business trying to explain or suggest that there are other conditions that are the cause or a cause of his problems, then at that point I would suggest the jury be instructed that this is his burden of proof as per my final—you don't have to give the whole extra charge, but the concept of it is he can't just get up there and blow smoke about this stuff. This is his burden of proof. He has to establish that by way of evidence and testimony, not hot air. So I will just put that is in the form of a request to charge in the event that he engages in this type of argument.

MR. STEARNS: I'm going to I think engage in this type of argument.

MR. TETENBAUM: Then I would request that charge.

MR. STEARNS: Your objection is at peace with everything you and your firm have

[2126]

done in this case. You are trying to control the facts.

THE COURT: I'm finished hearing you so go in peace. I don't know how much time you want.

MR. STEARNS: Twenty minutes is good enough.

(The following proceedings were conducted in open court.)

MR. TETENBAUM: I would like to offer some things in evidence that I thought were in. I offer Plaintiff's Exhibit 21 which is the Hospital for Joint Diseases, subject to my motion in limine concerning the statement about diabetes, which is important, and we have not had a ruling on that yesterday, but there should be no referencer to that in summation, pending a ruling.

MR. STEARNS: What's this?

MR. TETENBAUM: Hospital for Joint Diseases. Plaintiff's Exhibit 20 which is the Long Island Hospital record; Plaintiff's

[2127]

Exhibit 123 which is Doctor Rosenstadt's report of March 30, '07, with the understanding that no opinions would be used; and x-rays that were previously marked Plaintiff's Exhibit 106, 16, 38 and 105.

MR. STEARNS: For the record Exhibit J has been found and there's no objection to its admission.

(Defendant's Exhibit J was previously received in evidence.)

(Whereupon, Plaintiff's Exhibits 16, 20, 21, 38, 105, 106, 123 were received in evidence.)

(Whereupon, Defendant's Exhibit H was received in evidence.)

(Jury enters the courtroom.)

THE COURT: Jurors, I apologize. I miscalculated yesterday and I really should have said come at 10 or 10:30 because we had to take care of some preliminary stuff. I apologize for making you be here since 9:00;

* * *

(SUMMATION by MR. TETENBAUM) **[2194]**

* * *

[line 12 to line 18]

Reinauer was in the wrong, that's why we are here. They were liable and held liable for causing an accident to George Brown. George Brown comes in here with clean hands. He comes in here in a case where he is a victim of a wrongdoing of the defendant and that as far as I am concerned is Phase One.

* * *

(SUMMATION by MR. TETENBAUM) **[2195]**

* * * [line 16 to line 25]

You know, before this case started there was a lot, we are required to exchange information with each other. We are required to send, each side is required to give to the other side what they think

their positions are, what their experts are going to say so we can prepare for what's going on, to anticipate what's going on. The days of trial by ambush are long over. So I see the materials that I get and my understanding of the case was that

(SUMMATION by MR. TETENBAUM) **[2196]**

they were going to claim that George's pain and the thing that stops George from living a normal life was, they really had three choices. Almost like a menu, you can pick from column A or column B. It's either going to be diabetes polyneuropathy, if you don't believe it's diabetes polyneuropathy, well then it's alcoholic polyneuropathy and if you don't believe it alcoholic polyneuropathy, then how about trying meralgia paresthetica. I don't know if a person could have all three of those things at one time but they had three separate angles to try to deal with George's pain and that's the only issue you have by the way is George had pain.

* * *

(SUMMATION by MR. TETENBAUM) **[2201]**

* * * [line 8 to line 25]

You saw Doctor Schreiner. In evaluating somebody, it's a whatever, forgive me for using the word, it's a very subjective thing to evaluate somebody. There's no test that you can perform when you listen to Doctor Schreiner to judge whether he is telling the truth. You can't give him a bone scan to see if he is telling the truth. You can't give him an x-ray to see if he is telling the truth. You can't see if there are spots on his hand to see if he is telling

the truth. It's as subjective as it can get, but subjective does not mean suspect. You can judge whether he is telling you the truth. You can use the experience of your lifetime to evaluate whether he is telling you the truth. And it's a subjective thing and when you look at somebody and say, well, you know, I wonder if he is the

(SUMMATION by MR. TETENBAUM) **[2202]**

kind of guy I would want to go to if I had a problem and I wonder if he is believable. The question is, how did you feel? I mean, I will never tell you that I'm not biased in this case, I have been living, breathing and bleeding this case for a long time. I don't pretend to be impartial. You are the only ones who are impartial and the Judge. However, he seems to me like a straight shooting guy and he told you that George was in pain and that's all you have to decide. We have agreed that the only thing you have to decide in this case—

MR. STEARNS: I object to this. The critical issue in the case is one thing, the only issue for the jury to decide is another. This is wrong.

MR. TETENBAUM: He should not be speaking now. I could have stood up and gave 35 mini speeches when he spoke.

THE COURT: Overruled. Go ahead.

MR. TETENBAUM: Here is what Mr. Stearns asked Doctor Bender: Now you realize, of course, that the critical question is to what extent, if at all, the pain

(SUMMATION by MR. TETENBAUM) **[2304]**

complaints are genuine, right? And he stood up yesterday again when somebody else was on the stand and said the same thing but I didn't have time to read that transcript but if you want to look for it I am sure it could be found for you. That's the issue in the case. And I stood up and I said we agree. Remember? I stood up and said we agree. That is the issue in the case. Might want to change it now but that is the issue in the case and he said it twice. And at the end of the case when you have to decide you are going to get a verdict sheet. And the verdict sheet, nowhere on the verdict sheet is it going to talk about anything other than damages and pain and suffering, that's all, pain and suffering, if you find—you are not going to see anything about RSD or anything else, although I believe he has it. The questions you have to answer are, Do you find that the plaintiff is entitled to recover damages for pain and suffering, pain and suffering. That's it. If you believe that he has pain and suffering, has suffered pain since this thing happened, he is entitled to a

(SUMMATION by MR. TETENBAUM) **[2204]**

verdict according to the law which the Judge will give you.

MR. STEARNS: Your Honor, excuse me.

MR. TETENBAUM: Please, please, I'm begging you.

MR. STEARNS: I'm sorry. I have an obligation to do this. The lawyer is telling the jury what the law is, is describing his version of what the issues are. That's for you to decide, not for him.

MR. TETENBAUM: We had a discussion before.

THE COURT: I have to discuss the verdict sheet with the jurors anyway.

MR. TETENBAUM: We did discuss I would be referring to it, right?

THE COURT: Right.

* * *

(SUMMATION by MR. TETENBAUM) **[2257]**

* * * [line 9 to line 18]

I just want to touch on a couple of things and then I am going to sit down. The Judge is going to instruct you on causation. And this is not a criminal case, you are never going to hear the words proving a case beyond a reasonable doubt. Please listen carefully to what my burden is, it's much, much less than that. If anybody has any question, you can be free to ask the Judge to repeat it for you and he will.

* * *

[2267]

Trial Transcript, dated July 7, 2008
[pp. 2267 – 2301]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No. 05-1712

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

VOLUME XIV OF XIV
Ulster County Courthouse
Kingston, New York
July 7, 2008

BEFORE:

HON. CHRISTOPHER CAHILL
Supreme Court Justice

APPEARANCES:

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KEVIN O'DONNELL, ESQ.

Donna V. Meo
Senior Court Reporter

(JURY CHARGE) [2278]

THE COURT: Jurors, good morning. Hope everybody has a good three-day weekend. You all look well rested. I'm going to give you your instructions now then you can begin deliberating. So just listen carefully, it should take me hopefully 15, 20 minutes and then you can begin your deliberations.

Members of the jury, we have come now to that portion of the trial where you are instructed on the law applicable to the case and after which you will retire for your final deliberations. You have now heard all the evidence introduced by the parties and through arguments of their attorneys you have learned the conclusions which each party believes

should be drawn from the evidence presented to you.

You will recall that at the beginning of the trial I stated for you certain principles so that you could have them in mind as the trial progressed.

Briefly, they were that you are bound to accept the law as I give it to you whether or not you agree with it. You are not

(JURY CHARGE) [2279]

to ask anyone else about the law. You should not consider, accept any advice about the law from anyone else but me.

Furthermore, you must not conclude from my rulings or anything I have said during the trial that I favor any party to this lawsuit.

Furthermore, you may not draw any inference from an unanswered question nor consider testimony which has been stricken from the record in reaching your decision.

Finally, in deciding how much weight you choose to give to the testimony of any particular witness there is no magical formula that can be used. The tests used in your everyday affairs to decide the reliability or unreliability of statements made to you by others are the tests you will apply in your deliberations.

The items to be taken into consideration in determining the weight you will give to the testimony of a witness include the interest or lack of interest of the witness in the outcome of the case; the bias or

prejudice of the witness if there be any. The age, the appearance, the manner of the witness as the witness testified; the opportunity that the witness had to observe the facts about which he or she testified; the probability or improbability of the witness's testimony when considered in the light all the other evidence in the case.

If you find that any witness has willfully testified falsely as to any material fact, that is, as to an important matter, the law permits you to disregard completely the entire testimony of that witness upon the principle that one who testifies falsely about one material fact is likely to testify falsely about everything. You are not required, however, to consider such a witness as totally unbelievable. You may accept so much of his or her testimony as you deem true and disregard what you feel is false. By the processes which I have just described to you, you, as the sole judges of the facts, decide which of the witnesses you will believe, what portion of their testimony you accept, and what weight you

will give to it.

If in the course of your deliberations your recollection of any part of the testimony should fail or you have any question about my instructions to you on the law, you have the right to return to the courtroom for the purpose of having such testimony read to you or have such question answered.

In deciding this case you may consider only the exhibits which have been admitted in evidence and the testimony of the witnesses as you have heard it in this courtroom, or as there has been read to you testimony given on examination before trial. Under our rules of practice an examination before trial is taken under oath and is entitled to equal consideration by you notwithstanding the fact it was taken before the trial and outside the courtroom. However, arguments, remarks and summation of the attorneys are not evidence, nor is anything that I now say or may have said with regard to the facts evidence.

(JURY CHARGE) [2282]

Although as jurors you are encouraged to use all of your life experiences in analyzing testimony and reaching a fair verdict, you may not communicate any personal professional experience you might have or other facts not in evidence to the other jurors during deliberations. You must base your discussions and decisions solely on the evidence presented to you during this trial and that evidence alone. You may not consider or speculate on matters not in evidence or matters outside the case, while it is important that the views of all jurors be considered, a verdict of five of the six members of the jury will be sufficient under the law. Whenever five of your members are in agreement on a verdict you may report your verdict to the Court.

In reaching your verdict you are not to be affected by sympathy for any of the parties, what the reaction of the parties or of the public to your ver-

dict may be, whether it will please or displease anyone, be popular or unpopular or indeed any consideration outside

(JURY CHARGE) [2283]

the case as it has been presented to you in this courtroom. You should consider only the evidence, both the testimony and the exhibits. You should consider only the evidence, both the testimony and the exhibits, find the facts from what you consider to be the believable evidence, and apply the law as I now give it to you. Your verdict will be determined by the conclusion you reach no matter whom the verdict helps or hurts.

A lawsuit is civilized method of determining differences between people. It is basic to the administration of any system of justice that the decision on both of law and the facts be made fairly and honestly. You, as the jurors, and I, as the Court, have a heavy responsibility to ensure that a just result is reached in deciding the differences between the plaintiff and the defendant in this case.

As the jurors, your fundamental duty is to decide from all the evidence you have heard and the exhibits that have been submitted what the facts are. You are the sole, the exclusive judges of the facts. In

(JURY CHARGE) [2284]

that field you are supreme and neither I nor anyone else may invade your province. As the sole judges of the facts you must decide which of the witnesses you believe, what portion of their testi-

mony you accept, and what weight you give to it. On the other hand and with equal emphasis, I charge you that you are required to accept the law as it is given to you in this charge and in any instructions that I have given to you during the course of the trial. Whether you agree with the law as given to you by me or not, you are bound by it. You are not to ask anyone else about the law. You should not consider or accept any advice about the law from anyone else but me.

The process by which you arrive at a verdict is first to decide from all of the evidence and exhibits what the facts are and, second, to apply the law as I give it to you on to the facts as you have decided them to be. The conclusion thus reached will be your verdict. Your verdict will be in the form of answers to written questions which I will submit to you.

(JURY CHARGE) [2285]

In the course of the trial it has been necessary for me to rule on the admission of evidence and on motions made with respect to the applicable law. You must not conclude from any such rulings I have made or from any questions I may have asked or from anything I have said during the course of the trial or from these instructions or the manner in which they are given that I favor any party to this lawsuit. It is your recollection of evidence and your decision on the issues of fact which will decide the case.

At times during the trial I have sustained objections to questions asked without allowing the wit-

ness to answer, or where an answer was made instructed that it be stricken from the record and that you disregard it and dismiss it from your minds. You may not draw any inference or conclusions from an unanswered question, nor may you consider testimony which has been stricken from the record in reaching your decision. The law requires that your decision be made solely upon the evidence before you. Such items as I have excluded from

(JURY CHARGE) [2286]

your consideration were excluded because they were not legally admissible.

The law does not, however, require to you accept all the evidence I admit. In deciding what evidence you will accept you must make your own evaluation of the testimony given by each of the witnesses and decide how much weight you choose to give to that testimony. The testimony of a witness may not conform to the facts as they occurred because he or she is intentionally lying, because the witness did not accurately see or hear what he or she is testifying about, because the witness's recollection is faulty, or because the witness has not expressed himself or herself clearly in testifying. There is no magical formula by which you evaluate testimony. You bring with you to this courtroom all the experience and background of your lives. In your every affairs you decide for yourselves the reliability or unreliability of the things people tell you.

The same tests you use in your everyday dealings are the tests you apply in

your deliberations. The interest or lack of interest of any witness in the outcome of this case; the bias or prejudice of a witness if there be any; the age, the appearance, the manner in which the witness gives testimony on the stand; the opportunity that the witness had to observe the facts about which he or she testifies; the probability or improbability of the witness's testimony when considered in the light of all the other evidence in this case are all items to be considered by you in deciding how much weight, if any, you will give to that witness's testimony.

If it appears that there is a discrepancy in the evidence you will have to consider whether the apparent discrepancy can be reconciled by fitting the two stories together. If, however, that is not possible, you will then have to decide which the conflicting stories you will accept.

Direct and circumstantial evidence. There is two types of evidence which you may properly use in reaching your verdict, one type of evidence is direct evidence. Direct

evidence is when a witness testifies about something he or she knows by virtue of his or her own senses, something he or she has seen, felt, touched or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts.

Here is a simple example of circumstantial evidence which is often used.

Assume when you came in the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here someone walked in with an umbrella which was dripping wet. A few minutes later another person entered with a wet umbrella. Now, you cannot look outside the courtroom and you cannot see whether or not it is raining, so you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume it would be reasonable and logical for

(JURY CHARGE) [2289]

you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence, for it is a general rule the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict must be based on a preponderance of all the evidence presented.

In this case you will decide only the question of damages, that is, what amount of money will fairly and justly compensate the plaintiff for all losses resulting from the injuries he sustained. Since the question of liability has already been decided, any evidence concerning how the accident happened

will be received and considered by you only on the question of damages and not on the issue of liability.

Under the law applicable to this

(JURY CHARGE) [2290]

case the plaintiff, if he has sustained his burden of proof, may recover for pain and suffering, including physical disability, impairment, inconvenience and mental anguish and the effect of his injuries on the normal pursuits and pleasures of life experienced from the date of the accident until present, and pain and suffering including physical disability, impairment, inconvenience as you may find that he is likely to endure in the future as a result of his injuries, and loss of wages and other employment benefits from the time of the accident to the present, and loss of wages and other employment benefits in the future, and past expenses incurred by him as a result of his injuries such as medical bills, and future expenses to be incurred by him as a result of his injuries such as medical bills.

In addition to the defendant's responsibility for the plaintiff's fall and the injuries the plaintiff suffered at the time of the fall, the defendant is also responsible for any aggravation of those injuries and for any injuries, conditions, pain and suffering that

(JURY CHARGE) [2291]

resulted from any medical treatment that was provided for the plaintiff as a consequence of the injuries that he suffered at the time of the fall.

In the course of this trial you have heard about the plaintiff undergoing surgery for lipoma. The parties here have stipulated the lipoma was not caused by the accident so you may not consider it.

It has already been determined the plaintiff suffered injuries as a result of the defendant's negligence. You must, therefore, decide whether or not such negligence caused in whole or in part any injury or damages suffered by the plaintiff. Negligence may cause damage or injury even if it operates in combination with the act of another or some natural cause so long as the negligence played any part, even the slightest, in causing damage or injury.

Lost earnings. There are two categories of lost earnings. Past lost earnings, that is, from the date of the injury to trial, and future lost earnings, that is, from the date of the trial into the future.

(JURY CHARGE) **[2292]**

Regarding past lost earnings, plaintiff claims past lost earnings beginning April 1st, 2005.

In considering lost future earnings, it is assumed that if the injured party had not been disabled, he would have continued to work and receive wages and employment benefits for some period of time. The purpose of this element of damages is to compensate the worker for the loss of those wages and employment benefits. To determine the award for this element, if any, you must determine how many additional years the plaintiff would have worked as well as what his annual wages and employment benefits would have been during each future year.

Regarding the number of years which the plaintiff would have worked, I instruct you that George Brown is now 56 years old and has a work life expectancy, according to the work life tables, of seven more years. Such tables are, of course, nothing more than statistical averages. They neither assure that he will have the span of working life that I have given you nor assure that the span will not be

(JURY CHARGE) **[2293]**

greater.

The figures I have given you are not binding upon you but may be considered by together with your own experience and the evidence you have heard in determining what plaintiff's work life expectancy is.

Regarding the annual compensation plaintiff would you have received during each future year, you must address several items based on the evidence presented at trial.

First, you must determine the amount of wages that would have been received each year had he continued to work. Since the award, if any, is not subject to taxes, this amount should be an after-tax amount.

In determining the amount of such wages, you may start with the worker's annual wage at the time of injury. You may then consider the evidence presented and determine the extent to which plaintiff would have received raises due to the collective bargaining agreements between the defendant

employer and the plaintiff's union, years of service, merit, promotions, general increases

(JURY CHARGE) [2294]

in the wages of workers.

Second, you may consider, also consider fringe benefits including insurance coverage, pension and retirement plans, travel pay and grub money as compensation in each year.

Finally, you should deduct from this annual amount unreimbursed expenses which would have been incurred in earning the future income. Such expenses might include transportation to work, uniforms and such other items.

You should calculate the amount of compensation for each future year during which the plaintiff would have worked.

Once you have determined the lost annual compensation, if any, for each future year, totaling those annual figures would give you the approximate amount of lost future wages.

However, it is self evident a given sum of money in hand now is worth more than a like sum of money payable in the future in installments and over an extended period. A

(JURY CHARGE) [2295]

given sum of money now in hand may be invested and earn interest.

Thus, if you make an award for lost future earnings, you must reduce each annual installment to its present value. This process is referred to as discounting to present value.

With respect to the plaintiff's injuries that you find to be permanent, plaintiff is entitled to recover future pain, suffering and disability and the loss of his ability to enjoy life. In this regard you take into consideration the period of time that the plaintiff can be expected to live. In accordance with statistical life expectancy tables, Mr. Brown has a life expectancy of 26.4 years. Such a table, however, provides nothing more than a statistical average, it neither guarantees that Mr. Brown will live an additional 26.4 years or means that he will not live for a longer period. The life expectancy figure I have given you is not binding upon you but may be considered by you together with your own experience and the evidence you have heard concerning the condition of Mr. Brown's health,

(JURY CHARGE) [2296]

habits, employment and activities in deciding what Mr. Brown's life expectancy is.

Unlike damages for further economic losses, your award for future non economical damages such as pain and suffering, emotional distress, disability and inconvenience, is not to be discounted to present value.

Expert witnesses. You will recall certain witnesses testified concerning their qualifications and experts in various fields and gave their opinions concerning the issues in this case, when a case involves a matter of science or art or requires special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to express his or her opinion for the information of the

court and jury. The opinions stated by each expert who testified before you were based on particular facts as the expert obtained knowledge of them and testified to them before you or as the attorneys who questioned the witness asked the expert to assume.

You may reject the expert's opinion if you find the facts to be different from

(JURY CHARGE) [2297]

those which formed the basis for the opinion. You may also reject the opinion if after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion. It is entitled to such weight as you find the expert's qualifications in the field warrant and must be considered by you but is not controlling upon your judgment.

I instruct you to draw no inferences against any party for the failure of any doctor from the VA to appear before you. As VA doctors, they are not subject to subpoena by this Court and are not permitted to appear voluntarily.

In determining the amount of damages to which the plaintiff is entitled, you are not to speculate about or consider whether

(JURY CHARGE) [2298]

or not the plaintiff has or will have medical insurance or Medicare now or in the future, or whether plaintiff has received or will receive any benefits from the Social Security Administration now or in the future, it isn't proper for you to allow such matters to enter into your deliberations.

Okay. I have now outlined for you the rules of law that apply to this case and the processes by which you weigh the evidence and decide the facts, in a few minutes you will retire to the jury room for your deliberations. In order that your deliberations may proceed in an orderly fashion, you must have a foreperson, but of course his or her vote is entitled to no greater weight than that of any other juror.

Your function to reach a fair decision from the law and the evidence is an important one. When you are in the jury room listen to each other and discuss the evidence and issues in the case among yourselves, it is the duty of each of you, as jurors, to consult with one another and to deliberate with a view

(JURY CHARGE) [2299]

of reaching agreement on a verdict, if you can do so without violating your individual judgment and your conscience. While you should not surrender conscientious convictions of what the truth is and of the weight and effect of the evidence, and while each of you must decide the case for yourself and not merely consent to the decision of your fellow jurors, you should examine the issues and evidence

before you with candor and frankness and with proper respect and regard for the opinions of each other. Remember in your deliberations that the dispute between the parties is for them a very important matter. They and the Court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By so doing you carry out to the fullest your oaths as jurors to truly try the issues of this case and render a just verdict.

Alternate jurors. Ms. Jones.

Each of your cards are here. They are going to be put in the hopper then Ms. Jones will draw two names. Those will be the two alternate jurors to be excused.

[2300]

THE CLERK: Elizabeth Peruli. Robert Chapman. You are the two alternates.

THE COURT: Okay. You are free to go. We thank you for your service and I deeply appreciate your punctuality, your attentiveness and being good jurors, so thank you very much.

So you can now go in and begin your deliberations. Ms. Jones will give you the verdict sheet into the jury room. Thank you.

(Jury exits the courtroom.)

(Whereupon, Court Exhibit 11 was marked for identification.)

MR. STEARNS: Judge, can I just say one thing. There has been extensive discussion of what I call the critical charge. I think I have made that point repeatedly but I want to make sure it's on the

record. I am 99.9 percent it's on the record in a few other places and that is that an act of another that contributed in any part even in the slightest to injury or damages to the plaintiff, as the Court is aware, we asked, we insisted,

[2301]

unsuccessfully, that the only correct charge was that the damages owed by defendant only to the extent caused by the injury and that there has to be an unbroken chain of causation between an injury, whether or not serious, and the consequences claimed, and the charge as given brings into the issue of damages a purported rule of law that really has application only to the issue of contributory negligence and never to damages and we have objected and we have been overruled on that repeatedly.

MR. TETENBAUM: I would just ask that this record we were discussing before the jury went out be marked whatever the next exhibit is and the page that I have a yellow sticky on be marked that number with an A.

MR. STEARNS: What records are these?

MR. TETENBAUM: Somers Orthopedic. I am asking for something to be marked. You took it from my hand.

MR. STEARNS: I understand that and the reason I took it from his hand, if you have

* * *

Plaintiff's Requests to Charge,
dated June 23, 2008
[pp. 4672 – 4686]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

INDEX NO. 2005/1712
CAL. NO. 55-05-01165

GEORGE BROWN,

Plaintiff,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

PLAINTIFF'S REQUESTS TO CHARGE

PLAINTIFF'S REQUEST TO CHARGE #1

FJI: 90-44 PERSONAL INJURY ACTION (ADAPTED)

Under the Jones Act, the plaintiff, if he has sustained his burden of proof, may recover for:

1. Pain and suffering, including physical disability, impairment and inconvenience and mental anguish and the effect of his injuries on the normal pursuits and pleasures of life, experienced from the date of the accident to the present; and

2. Pain and suffering, including physical disability, impairment and inconvenience as you may find that he is likely to endure in the future as a result of his injuries; and

3. Loss of wages and other employment benefits from the time of the accident to the present; and

4. Loss of wages and other employment benefits in the future; and

5. Past expenses incurred by him, as a result of his injuries, such as medical bills; and

6. Future expenses to be incurred by him, as a result of his injuries, such as medical bills.

PLAINTIFF'S REQUEST TO CHARGE # 2

In addition to the defendant's responsibility for the plaintiff's fall and the injuries that the plaintiff suffered at the time of the fall, the defendant is also responsible for any aggravation of those

injuries and for any additional injuries, conditions, pain or suffering that resulted from any medical treatment that was provided to the plaintiff as a consequence of the injuries that he suffered at the time of the fall.

Based on *Restatement (Second) of Torts § 457, Comment a.*; *Doyle v. Graske*, 2008 WL 824276 (D. Neb. 2008); *Denver & Rio Grande W. R.R. Co.* v. *Conley*, 293 F.2d 612, 613 (10th Cir. 1961); *Exner Sand & Gravel Corp. v. Petterson Lighterage & Towing Corp.*, 258 F.2d 1, 3 (2d Cir. 1958); *Kansas City S. Ry. Co. v. Justis*, 232 F.2d 267, 272 (5th Cir. 1956); *see also* PJI 2:305.

PLAINTIFF'S REQUEST TO CHARGE # 3

PJI 2:284. DAMAGES–PERSONAL INJURY–SHOCK, EMOTIONAL DISTRESS AND PHYSICAL CONSEQUENCES THEREOF

If you find that the plaintiff is entitled to recover from the defendant, you must also include in your verdict damages for any mental suffering, emotional and psychological injuries and any physical consequences resulting from the emotional distress caused by the wrongful act of the defendant.

PLAINTIFF'S REQUEST TO CHARGE # 4

FJI: 90–25. FOURTH ELEMENT–CAUSATION (ADAPTED)

It has already been determined that the plaintiff suffered injuries due to defendant's violation of the Jones Act.

Plaintiff claims that all his pain, suffering, disability and economic losses resulted from the fall and/or the care and treatment related thereto.

Defendant claims that portions of plaintiff's injury were not caused by the fall and/or the care and treatment related thereto.

To establish causation the plaintiff must show that the fall and/or the care and treatment related thereto played any part, even the slightest, in bringing about an injury to the plaintiff.

However, it is important to remember that there can be more than one cause of an injury. The involvement of any other cause does not prevent a finding for the plaintiff, as long as you find that the fall, or the consequences of the fall and/or the care and treatment related thereto played any part, no matter how slight, in causing an injury to the plaintiff.

Based on *Rogers v. Missouri Pacific Railroad Co.*, 352 US 500, 506 (1957)

Plaintiff's Request to Charge # 5

FJI: 90–47. Loss of Past Earnings

There are two categories of lost earnings: past lost earnings, that is, from the date of injury to trial; and future lost earnings, that is from the date of trial into the future.

Regarding past lost earnings, plaintiff claims past loss of earnings beginning April 1, 2005.

Plaintiff's Request to Charge # 6

FJI: 90–48. Lost Earnings–Introduction (Adapted)

In considering lost future earnings, it is assumed that if the injured party had not been disabled, he would have continued to work and to receive wages and employment benefits for some period of time. The purpose of this element of damages is to compensate the worker for the loss of those wages and employment benefits. To determine the award for this element, if any, you must determine how many additional years the plaintiff would have worked, as well as what his annual wages and employment benefits would have been during each future year.

Regarding the number of years which the plaintiff would have worked, I instruct you that George Brown is now 56 years old and has a work life expectancy according to the work life tables of 7 more years. Such tables are, of course, nothing more than statistical averages. They neither assure that he will have the span of working life that I have given you nor assure that the span will not be greater.

The figures I have given you are not binding upon you, but may be considered by you together with your own experience and the evidence you have heard in determining what plaintiff's work life expectancy is.

PLAINTIFF'S REQUEST TO CHARGE # 7

FJI: 90–49. LOST EARNINGS–COMPUTATION (ADAPTED)

Regarding the annual compensation which plaintiff would have received in each future year, you must address several items, based on the evidence presented at this trial:

First, you must determine the amount of wages that would have been received each year had he continued to work. Since the award, if any, is not subject to taxes, this amount should be an after-tax amount

In determining the amount of such wages, you may start with the worker's annual wage at the time of injury. You then may consider the evidence presented and determine the extent to which the plaintiff would have received raises due to the collective bargaining agreements between the defendant-employer and the plaintiff's union, years of service, merit, promotions, or general increases in the wages of workers.

Second, you may also consider fringe benefits, including insurance coverage, pension and retirement plans, travel pay and grub money as compensation in each year.

Finally, you should deduct from this annual amount unreimbursed expenses which would have been incurred in earning the future income. Such expenses might include transportation to work, uniforms and other such items.

You should calculate an amount of compensation for each future year during which the plaintiff would have worked.

PLAINTIFF'S REQUEST TO CHARGE # 8

FJI: 90–51. DISCOUNTING TO PRESENT VALUE

Once you have determined the lost annual compensation, if any, for each future year, totaling those annual figures would give you the approximate amount of lost future wages. However, it is self evident that a given sum of money in hand now is worth more than a like sum of money payable in the future in installments and over an extended period. A given sum of money now in hand may be invested and earn interest. Thus, if you make an award for lost future earnings, you must reduce each annual installment to its present value. This process is referred to as "discounting to present value."

PLAINTIFF'S REQUEST TO CHARGE # 9

PJI 2:281. DAMAGES–PERSONAL INJURY–PERMANENCE–LIFE EXPECTANCY TABLES (ADAPTED)

With respect to the plaintiff's injuries or disabilities that you find to be permanent, the plaintiff is entitled to recover future pain, suffering and disability and the loss of his ability to enjoy life. In this regard you take into consideration the period of time that the plaintiff can be expected to live. In accordance with statistical life expectancy tables, Mr. Brown has a life expectancy of 26.4 years. Such

a table, however, provides nothing more than a statistical average. It neither guarantees that Mr. Brown will live an additional 26.4 years or means that he will not live for a longer period. The life expectancy figure I have given you is not binding upon you, but may be considered by you together with your own experience and the evidence you have heard concerning the condition of Mr. Brown's health, habits, employment and activities in deciding what Mr. Brown's present life expectance is.

PLAINTIFF'S REQUEST TO CHARGE # 9A

JURY NOT TO DISCOUNT PAIN AND SUFFERING TO PRESENT VALUE DAMAGES

Unlike damages for future economic losses, your award for future non-economic damages such as pain and suffering, emotional distress, disability, and inconvenience is not to be discounted to present value.

Taylor v. *Denver & Rio Grande Western R.R.*, 438 F.2d 351, 353 (10th Cir. 1971); *United States v. Hayashi*, 282 F.2d 599, 606 (9th Cir. 1960); *Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 885 (8th Cir. 1980); *Texas and Pacific Ry. v. Buckles*, 232 F.2d 257,264 (5th Cir.), *cert. denied*, 351 U.S. 984, 76 S.Ct. 1052, 100 L.Ed. 1498 (1956); *Chicago & N.W.Ry. v. Candler*, 283 F. 881, 885 (8th Cir. 1922); *Braddock v. Seaboard Air Line R.R.*, 80 So.2d 662, 668 (Fla. 1955); *O'Hara v. City of Scranton*, 342 Pa. 137,139, 19 A.2d 114, 115 (1944); *Parrott v. Edwards*, 113 Ga. App. 422, 431,148 S.E.2d 175, 182 (1966); *Missouri Pacific R.R. v. Handley*,

341 S.W.2d 203, 205 (Tex. Civ. App. 1960); *Hall v. Chicago & N.W.Ry.*, 349 Ill. App. 175, 192-93, 110 N.E.2d 654, 661-62 (1953), also see PJI 2:306.

PLAINTIFF'S REQUEST TO CHARGE # 10

PJI 1:190. GENERAL INSTRUCTION–EXPERT WITNESS (ADAPTED)

You will recall certain witnesses testified concerning their qualifications and experts in various fields and gave their opinions concerning the issues in this case. When a case involves a matter of science or art or requires special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his or her opinion for the information of the court and jury. The opinions stated by each expert who testified before you were based on particular facts, as the expert obtained knowledge of them and testified to them before you, or as the attorneys who questioned the expert asked the expert to assume. You may reject the expert's opinion if you find the facts to be different from those which formed the basis for the opinion. You may also reject the opinion if, after careful consideration of all the evidence in the case, expert and other, you disagree with the opinion. In other words, you are not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is given to assist you in reaching a proper conclusion; it is entitled to such weight as you find the

expert's qualifications in the field warrant and must be considered by you, but is not controlling upon your judgment.

PLAINTIFF'S REQUEST TO CHARGE # 11

I instruct you to draw no inferences against any party for the failure of any doctor from the VA to appear before you. As VA doctors, they are not subject to subpoena by this Court and are not permitted to appear voluntarily.

[handwritten] [Missing]

PLAINTIFF'S REQUEST TO CHARGE # 12

JURY NOT TO CONSIDER COLLATERAL SOURCES

In determining the amount of damages to which the plaintiff is entitled you are not to speculate about or consider whether or not the plaintiff has or will have medical insurance or Medicare now or in the future or whether the plaintiff has received or will receive any benefits from the Social Security Administration now or in the future. It is improper for you to permit such matters to enter into your deliberations.

PLAINTIFF'S REQUEST TO CHARGE # 13

FJI: 74–2. DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two types of evidence which you may properly use in reaching your verdict.

One type of evidence is direct evidence. Direct evidence is when a witness testifies about something he knows by virtue of his own senses—something he has seen, felt, touched or heard. Direct

evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. There is a simple example of circumstantial evidence which is often used in this courthouse.

Assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella which was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of the reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence; for, it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but simply requires that your verdict must be based on *(e.g.*, a preponderance of) all the evidence presented.

PLAINTIFF'S REQUEST TO CHARGE # 14

PJI 2:306. DAMAGES–PERSONAL INJURY–
SUBSEQUENT INJURY–
SUBSEQUENT ACCIDENT (ADAPTED)

If you find that plaintiff suffered causally related injuries and depression rendering him less able to cope with his subsequent neck problem, the plaintiff is entitled to recover from the defendant for any such aggravation of his depression condition.

Dated: June 23, 2008
Newburgh, New York

LARKIN, AXELROD, INGRASSIA
& TETENBAUM, L.L.P.

/s/ _____

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Plaintiff's Further Additional Requests to Charge, dated June 30, 2008 [pp. 4687 – 4688]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

INDEX NO. 2005/1712
CAL. NO. 55-05-01165

GEORGE BROWN,

Plaintiff,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

PLAINTIFF'S ADDITIONAL REQUESTS TO CHARGE

PLAINTIFF'S REQUEST TO CHARGE #15

FJI: 90-1 The Jones Act (Adapted)

The plaintiff George Brown brings this action against the defendant Reinauer Transportation under the Jones Act. The Jones Act provides in substance that every employer whose employees are members of a crew of a vessel in navigation shall be liable in damages for injuries to its employees resulting in whole or in part from the negligence of any of its officers, agents or employees or from any defect or deficiency, due to its negligence, in the vessel or its equipment.

Based on Modern Federal Jury Instruction 90-1

PLAINTIFF'S REQUEST TO CHARGE #16

Trial on Damages Only

In this case you will decide only the question of damages, that is, what amount of money will fairly and justly compensate the plaintiff for all losses resulting from the injuries he sustained. Since the question of liability has already been decided, any evidence concerning how the accident happened will be received and considered by you only on the question of damages, and not on the issue of liability.

Based on NY PJI 1:2B

Dated: June 30, 2008
Newburgh, New York

LARKIN, AXELROD, INGRASSIA
& TETENBAUM, L.L.P.

/s/ _____

Elliot S. Tetenbaum
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[4689]

Plaintiff's Further Additional Requests to Charge, dated June 30, 2008 [pp. 4689 – 4690]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

INDEX NO. 2005/1712
CAL. NO. 55-05-01165

GEORGE BROWN,

Plaintiff,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

PLAINTIFF'S FURTHER ADDITIONAL REQUESTS TO CHARGE

PLAINTIFF'S REQUEST TO CHARGE #17

PJI 1:75 GENERAL INSTRUCTION–EVIDENCE–
FAILURE TO PRODUCE WITNESS–
IN GENERAL

A party is not required to call any particular person as a witness. However, the failure to call a certain person as a witness may be the basis for an inference against the party not calling the witness. For example in this case the defendant did not call Dr. Benjamin Rosenstadt, an orthopedic surgeon to testify concerning the plaintiff's physical conditions, and Dr. Azariah Eshkenazi, a psychiatrist, to testify on the question of plaintiff's mental and emotional condition. The defendant has offered no explanation for not calling either Dr. Rosenstadt or Dr. Eshkenazi.

If no explanation has been offered you may, although you are not required to, conclude that the testimony of Dr. Rosenstadt and Dr. Eshkenazi would not support the defendant's position on the question of plaintiff's physical and mental and emotional conditions, and would not contradict the evidence offered by the plaintiff on this question and you may, although you are not required to, draw the strongest inference against the defendant on that question, that opposing evidence permits.

Dated: June 30, 2008
Newburgh, New York

LARKIN, AXELROD, INGRASSIA
& TETENBAUM, L.L.P.

/s/ ELLIOT S. TETENBAUM

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Plaintiffs' Supplemental Request to Charge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No. 05-1712

GEORGE BROWN and PATRICIA BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

PLAINTIFF'S SUPPLEMENTAL REQUEST TO CHARGE

The defendant contends that regardless of any injury the plaintiff George Brown may have sustained as a result of his fall or the care and treatment relating thereto, he was or would in any event have been disabled by an unrelated medical condition. The defendant bears the burden of proving both (1) that the plaintiff has such an unrelated medical condition, and (2) the extent of the dam-

ages that this unrelated condition would inevitably have caused. If you find that the defendant has sustained its burden of proof, you should discount the plaintiff's damages to reflect the proportion of damages that you find would inevitably have been suffered by the plaintiff even in the absence of the injury caused by his fall or by the care and treatment relating thereto. However, if you are unable to separate the damages caused by the unrelated medical condition, then you must hold the defendant liable for all of the plaintiff's damages.

Authority: *Maurer* v. *United States*, 668 F.2d 98, 100 (2d Cir. 1981); *Ahlf v. CSX Transportation, Inc.*, 386 F.Supp.2d 83, 91 (N.D.N.Y. 2005); *Stevens v. Bangor and Aroostook Railroad Company*, 97 F.3d 594, 601 (1st Cir. 1996).

Defendants' Proposed Jury Charges
[pp. 4692 – 4697]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Civil Action
Index No.: 05-1712
Hon. Christopher E. Cahill

GEORGE BROWN,

Plaintiff(s),

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, LP, THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendant(s).

DEFENDANT'S PROPOSED JURY CHARGES

DAMAGES GENERALLY

Your award must be fair and just.

It should neither be excessive nor inadequate; it should be reasonable.

Your purpose is not to punish the defendant or to enrich the plaintiff. Any award of damages that you make must be fair, reasonable and commensurate with the nature and extent of the injury actually sustained.

You are not permitted to award speculative damages. This means you are not to include in any verdict compensation for any prospective or future loss which, although possible, is not reasonably certain to occur in the future. Neither may you award damages against the defendant for any injury or condition suffered by plaintiff that he does not show, by a preponderance of the evidence, to have been caused by the accident alleged here by him.

PERSONAL INJURY ACTION

In this case the plaintiff if he has sustained his burden of proof, may recover for:

1. Loss of earnings from the time of the accident to the present, and in the future;

2. Pain, suffering and mental anguish, including the effect of his injury on the normal pursuits and pleasures of life, experienced from the date of the accident to the present; and

3. Pain, suffering and mental anguish, if any, as you may reasonably find he is likely to endure in the future as a result of his injury.

4. The plaintiff may also recover his out of pocket expenses, such as medical bills, incurred in the past and into the future

CAUSATION

Plaintiff claims lost earnings and employment related benefits, not from the date of the accident, but from April 1, 2005. He does so because his wages and benefits continued after his accident; he received his pay until April 1, 2005 and he and his family had medical coverage provided by defendant until September 14, 2006. Plaintiff as a result claims past economic loss from April 1, 2005 to date. To recover past economic loss plaintiff must establish the period that he was disabled by the injuries he actually sustained July 21, 2003 to his right hip and elbow; or by some consequence of surgery other than for removal of a lipoma made necessary by his hip injury. To award any damages for an injury consequence, including damages for economic loss and pain and suffering, you must find that there is a direct and unbroken chain of causation between the injury and the consequence alleged, including RSD, exists and was caused either by hip injury or hip surgery other than for the removal of a lipoma. But you must also determine that his pain and disability, if he has any, is not the result of any other condition, such as peripheral neuropathy caused by alcohol abuse or diabetes; or by inappropriate use of narcotic pain medications. For an injury to be the cause of an alleged consequences there must be a unbroken chain of connection

between the consequence and the injuries which you find plaintiff actually sustained.

PROXIMATE CAUSE

You are not to award damages for any injury or condition from which plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question.

The causal nexus between a defendant's conduct and the injury will be broken where there are intervening circumstances that are extraordinary under the circumstances, unforeseeable in the normal course of events, different in kind from the foreseeable risks associated with the original negligence, or independent or far removed from the defendant's conduct. A defendant is relieved of liability where, after his negligence, an unforeseeable superseding force intervenes which breaks the chain of causal connection and itself causes the injury. Further, a plaintiffs' own conduct may be a superseding force absolving a defendant from liability.

If you perceive an intervening act or force as triggering injury, the defendant's original liability is a proximate causes of harm if it led to the plaintiff's injury in a continuous sequence, uninterrupted by an efficient or independent intervening cause. On the other hand, if you believe that the intervening cause is the only proximate cause because it is the efficient or immediate cause, then the intervening cause will be called a superseding cause and the defendant will not be liable. Therefore, if you

find there were independent intervening acts which operate upon but do not flow from the original injury plaintiff is not entitled to recover from defendant for those injuries.

LOST EARNINGS

There are two categories of lost earnings; past lost earnings, that is from the date of injury to trial and future lost earnings, from the date of trial into the future. If you should find plaintiff is entitled to a verdict for lost earnings, in arriving at the amount of the award for past lost wages you should include the reasonable value of the time, if any, shown by the evidence to have been necessarily lost to date by plaintiff as a result of his injury because unable to pursue his former occupation, or any alternative employment you find he was capable of performing. In determining this amount, you should consider any evidence of plaintiff's earning capacity as a merchant seaman or elsewhere, his earnings and earnings history generally, the manner in which he ordinarily worked and occupied his time before the claimed injury to determine what he was reasonably certain to have earned during the time so lost, had he not been disabled.

Any award for future lost income should be based, in part, on plaintiff's work-life expectancy. The physical nature of the work of a seaman is a relevant factor to consider in determining plaintiff's work-life expectancy. *Robillard v. A.L. Burbank Co. Ltd.*, 186 F. Supp. 193 (SDNY 1960); *Puggioni* v. *Luckenbach Steamship Company*, 286

F.2d 340 (2d Cir. 1961); *Yodice* v. *Kuninklyki Nederlandsche Stoom Maat*, 443 F.2d 76 (2d Cir. 1971).

However, actuarial data with respect to possible or probable future earnings of plaintiff is not conclusive. It should not be adopted at face value as the sole basis for determination of wages. *Thomas v. Potomac Electric Power*, 266 F. Supp. 687 (USDC D.C. 1967). Plaintiff must prove prospective or future lost wages with reasonable certainty. You may not make an award for future lost wages which, although possible, are not reasonably certain to occur in the future.

Any award you make for earnings lost to date must not be the result of speculation: any award must be calculated from the number of days that you find plaintiff was disabled from working by the injuries and the amount that you find plaintiff would have earned had he not been disabled.

If you find plaintiff has proved a reduction of his earnings capacity in the future, your award should be determined on the basis of:

- $ plaintiffs earnings before the accident,
- $ the condition of his health,
- $ his prospects for continued employment and/or advancement,
- $ the extent to which you find that those prospects have been reduced by the injuries,
- $ the length of time that you find plaintiff would reasonably have been expected to work had he not been injured,

LOST EARNINGS – COMPUTATION

Regarding the annual compensation which you find plaintiff would have received in each future year, you must address several items, based on the evidence presented at this trial:

First, you must determine the amount of wages that would have been received in each year. Since the plaintiff's award, if any, is not subject to taxes, this amount should reflect the plaintiff's wages after deduction of taxes.

In determining the amount of such wages, you may start with the worker's annual wage at the time of injury.

Second, you may also consider fringe benefits, including contributions toward insurance coverage, pension and retirement plans as compensation in each year.

Finally, you should deduct from this amount unreimbursed expenses which would have been incurred in earning the future income. Such expenses can include uniforms, union dues and other such items.

You should calculate an amount of compensation for each future year during which you find the plaintiff would have worked.

DAMAGES – PAIN AND SUFFERING

Plaintiff claims he is entitled to receive damages for pain, suffering and mental anguish, including the effect of his injuries on the normal pursuit and pleasures of life, experienced from the date of the

occurrences to the present date. If you decide plaintiff has experienced pain and suffering in any of those forms he is entitled to recover a sum of money which will justly and fairly compensate him for any injury and conscious pain and suffering to date caused by defendant. Conscious pain and suffering means pain and suffering of which there was some level of awareness by plaintiff.

DAMAGES – PERMANENCE

With respect to any of plaintiff's injuries or disabilities that you find to be permanent, the plaintiff is entitled to recover for future pain, suffering and disability and the loss of his ability to enjoy life. In this regard you may take into consideration the period of time that plaintiff can be expected to experience pain as well as live. In accordance with statistical life expectancy tables, plaintiff has a statistical life expectancy of ___** years. Such a table, however, provides nothing more than an average life span of people his age. It neither guarantees that plaintiff will live an additional __** years or means that he will not live for a longer period. The life expectancy figure I have given you is not binding upon you, but may be considered by you together with your own experience and the evidence you have heard concerning the condition of plaintiff's health, his habits, employment and activities in deciding what the plaintiff's present life expectancy is.

DAMAGES – PRE-EXISTING INJURIES

In this case, plaintiff had a preexisting heart condition and he claimed in an application for Social Security Administration benefits that he was disabled because he had suffered a hip fracture and on account of his heart. In addition defendant claims he suffers, and has since no later than April 1, 2005, from peripheral neuropathy due to alcohol abuse and/or diabetes. Plaintiff has the burden of proving the extent of aggravation and resulting damages caused by the injury, if any, for which the defendant is found to be liable. A defendant is not liable for conditions or disabilities which pre-existed his accident which would have arisen over time in any event

DAMAGES – DUTY TO MITIGATE

Of course, every injury victim has the duty to mitigate, or lessen, his damages by, for example, submitting to appropriate medical treatment in a timely manner, and making reasonable efforts to return to his former work in the event he is able to; or if unable to, to find alternative suitable employment within his capacity. Because of this duty, defendant cannot be found liable for damages on account of lost wages or income which would not have been lost had plaintiff taken reasonable steps, such as sought and found suitable work within his capacity. In addition plaintiff has taken and continues to take narcotics which, if he does not have the pain he claims would be both inappropriate and disabling and a cause of his loss for what you cannot award him any damages.

AWARD NOT TAXABLE

If your verdict is in favor of the plaintiff, he will not be required to pay income taxes on the award and the award, therefore, must not include anything for taxes.

COUNSEL'S ARGUMENTS

In his summation, the attorney for plaintiff has suggested specific amounts that should be awarded to the plaintiff as damages for various items. These dollar figures advanced by counsel, except those, if any, fixed by stipulation between the parties, do not constitute evidence; they represent argument which you are free to consider or disregard in your deliberations. Your damage award, if any, should be based upon the testimony and other evidence received during the trial.

To summarize, the purpose of these various instructions on damages is to help you determine a figure, should you find that an award is appropriate, that puts plaintiff in the same position, to the extent an award of money can do so, as if he had not been injured as he claims.

VERDICT FORM

To assist you in your deliberations, I have prepared a special verdict form for you to use in recording your decision.

The special verdict form is made up of questions concerning the important issues in this case. These questions are to be answered according to the instructions on the sheet. Your answers must be unanimous and must reflect the conscientious

judgment of each juror. You should answer every question except where the verdict form indicates otherwise.

In the beginning of each section, you will be advised as to whose burden it is with respect to each element of the legal theory. Your verdict will be based on the answers that you give to certain questions that will be submitted to you. Each of the questions asked calls for either a "yes" or "no" answer, except the questions requiring a numerical response. While it is important that the views of all jurors be considered, all of you must agree on the answer to each question, When all of you have agreed on any answer, the foreperson of the jury will write the answer in the space provided for each answer and each juror will sign in the appropriate place to indicate his or her agreement. The decision by you must be unanimous.

When you have answered all the questions that require answers, report to the Court.

Do not assume from the questions or from the wording of the questions or from my in on them what the answers should be.

Defendants' Objections to Plaintiff's Proposed Jury Charges [pp. 4698 – 4701]

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Civil Action
Index No.: 05-1712
Hon. Christopher E. Cahill

GEORGE BROWN,

Plaintiff(s),

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, LP, THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendant(s).

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED JURY CHARGES

Defendant's objection to charge number 1

Defendant requests a charge of "Falsus in Unem Falsus in Omnium."

Defendant's objection to charge number 2

Failure to charge that although defendant is also responsible for any aggravation of injuries suffered at the time of his fall as well as for any additional injuries, conditions, pain, or suffering, that resulted from medical treatment that applies only to those injuries which have been proven to have been caused by his fall. Because plaintiff has claimed surgical injury but has not introduced any evidence that a lipoma on his right thigh was caused by his July 21, 2003 accident, the jury cannot award damages for that condition or any consequential damages on account of it even if plaintiff suffered adverse consequences from its surgical removal.

Defendant's objection to charge number 3

Defendant contends that plaintiff's charge number 3 should not be given since included in his charge number 1 ("and mental anguish").

Defendant's objection to charge number 5 (causation)

Plaintiff claims lost earnings and employment related benefits, not from the date of the accident, but from April 1, 2005. He does so because his wages and benefits continued after his accident; he received his pay until April 1, 2005 and he and his family had medical coverage provided by defendant until September 14, 2006. Plaintiff as a result

claims past economic loss from April 1, 2005 to date. To recover past economic loss plaintiff must establish the period that he was disabled by the injuries he actually sustained July 21, 2003 to his right hip and elbow; or by some consequence of surgery other than for removal of a lipoma made necessary by his hip injury. To award any damages for an injury consequence, including damages for economic loss and pain and suffering, you must find that there is a direct and unbroken chain of causation between the injury and the consequence alleged, including RSD, exists and was caused either by hip injury or hip surgery. But you must also determine that his pain and disability, if he has any, is not the result of any other condition, such as peripheral neuropathy caused by alcohol abuse or diabetes; or by inappropriate use of narcotic pain medications. For an injury to be the cause of an alleged consequences there must be a unbroken chain of connection between the consequence and the injuries which you find plaintiff actually sustained.

Defendant's objection to request number 7

Defendant requests the court not charge plaintiff's "lost earnings-computation (adapted)." Language: "First, he must determine the amount of wages that would have been received each year had he continued to work," perpetuates plaintiff's error in failing to submit a charge on causation between the injuries sustained and the consequences alleged, in this case in which, but for claim of consequential injury, no trial and damages would like-

ly have been required. Defendant objects to all the language of plaintiff's charge number 7 which directs the jury to award a variety of damages without considering the extent to which those damages caused by were a consequence of plaintiff's fall.

Defendant's objection to request number 8

Defendant objects to plaintiff's charge #8 which like # 7 directs the jury to award damages in the future without regard for causation on to whether plaintiff suffers from the condition (s) on account of which he claims he will be disabled in the future.

Defendant's objection to request number 9

Defendant objects to plaintiff's charge #9 because of its language "with respect to the plaintiff's injuries or disabilities that you find to be permanent, the plaintiff is entitled to recover pain and suffering and disability" etc. This charge would require the jury to award damages for disability even if determines, for example, that plaintiff has, and has had, disabling peripheral neuropathy. The life expectancy figure of 26.4 years is also not supported by any evidence.

Defendant's objection to request number 9A

Defendant objects to plaintiff's charge #9A because it states future non-economic loss is not be discounted to present value. The more modern federal rule is to the contrary. For this reason defendant requests the court charge as follows:

If you find that the plaintiff is entitled to an award of for future non-economic damages, such as future pain and suffering or future emotional distress, it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money that plaintiff would not have received until some future date but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump-sum payment of anticipated future loss, the law requires you to discount, or reduce to its present worth, the amount of the anticipated future loss. Further, any future award will not be subject to federal or state income taxes. Therefore, if you decide to award plaintiff an amount for future economic and non-economic damages, you must not award anything to reflect plaintiffs liability to pay income taxes.

See, Oliveri v. Delta S.S. Lines, Inc., 849 F.2d 742 (2d Cir. 1988) (holding award for future pain and suffering in Jones Act action was required to be discounted to present value,); *Metz* v. *United Technologies Corp.*, 754 F.2d 63, 67 (2nd Cir. 1985) ("it is proper to discount awards for future pain and

suffering to present value."); *Chiarello v. Domenico Bus Service, Inc.*, 542 F.2d 883, 886 (2d Cir. 1976) (holding future pain and suffering should be reduced to present value and explaining "[i]rrespective of the type of injury involved, the advantage of the present use of money is the same and should be taken into account in arriving at the proper amount of damages").

Defendant's objection to charge number 10

Defendant objects to this charge to the extent it does not instruct the jury that with respect to an expert opinion, the jury may reject the opinion if they find it is inconsistent with the facts or is contradicted by the opinions the expert expressed previously.

Defendant's objection to request to charge number 11

Plaintiff beginning on March 2, 2003 was evaluated by David T. Stamer, M.D. the physician who treated him at Dutchess County Orthopedic Associates before his return to work on November 26, 2003 who on March 4, 2002 stated "he is not disabled." He was thereafter examined by another physician March 22, 2004, Dr. John M. Uhorochak an orthopedist practicing with in New Windsor New York. He then saw Victor Khabie M.D. an orthopedist and Nicholas R. Panaro, M.D. a pain management specialist at the Somers Orthopedic in Newburgh, New York both of whom stated he had evidence of RSD. He was also seen by David Jaeger, M.D. a neurologist affiliated at Crystal Run

Medical Center who reported he had Meralgia Paresthica as did Dr. Conyack. Doctors Stamer, Khabie, Panaro and Jaeger are all available treating doctors having no affiliation with defendant whom plaintiff decided not to call. Defendant is entitled to a missing witness charge with respect to all of them.

Defendants' Additional Proposed Jury Charges, dated July 1, 2008 [pp. 4702 – 4706]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

Index No. 2005/1712

GEORGE BROWN,

Plaintiffs,

—against—

REINAUER TRANSPORTATION COMPANIES, LLC, REINAUER TRANSPORTATION COMPANIES, L.P., THE REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY, LLC and REINAUER MANAGEMENT COMPANY, INC.,

Defendants.

DEFENDANTS' ADDITIONAL PROPOSED JURY CHARGES

Under the Jones Act, seamen are afforded rights parallel to those of railway employees under the Federal Employers' Liability Act ("FELA"). 46 U.S.C. § 688. The measure of damages under FELA is a matter of substantive federal law, even though

the action is brought in state court. *See Dale v. Baltimore & Ohio R.R. Co.*, 519 A.2d 450, 453 (Pa. 1986). Accordingly, "the propriety of jury instructions concerning the measure of damages in a FELA [/Jones Act] action is an issue of 'substance' determined by federal law." *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

Section 51 of the FELA provides, in pertinent part, that "[e]very common carrier by railroad . . . shall be liable in damages . . . for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (emphasis added). A seaman is entitled to recovery under the Jones Act, therefore, if his employer's negligence is the cause, in whole or in part, of his injury. Historically, in articulations of § 51 liability, courts had replaced the phrase "in whole or in part" with the adjective "slightest." *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997). In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957), the Supreme Court used the term "slightest" to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA § 51 cases. In *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957), the Court applied the same standard to a Jones Act case, writing: " 'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' " (quoting

Rogers, 352 U.S. at 506.) The phrase "in whole or in part" as set forth in the statute, or, as it has come to be known, "slightest" or "no matter how slight" refers, however, only to the quantum of evidence of an employer's breach of duty necessary to sustain a jury verdict *See Gautreaux*, 107 F.3d at 335. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542-44 (1994), the Supreme Court held that common law tort principles are entitled to great weight in the FELA (hence, Jones Act) analysis unless those principles are expressly rejected or modified in the text of the statute.

Nothing in the text of the Jones Act statute modifies the common law rule that "a tortfeasor is liable to the extent that his wrong aggravates a pre-existing disability, but in such case, he is liable only to the extent of the aggravation. He is not liable for the preexisting condition as such." *See, e.g., Curry v. U.S.*, 327 F. Supp. 155 (D.C.Cal. 1971). In *Trindle v. Sonat Marine, Inc.*, No. 85-7085, 1990 WL 893 (E.D.Pa. Jan. 5, 1990), the court noted the "well settled" rule was that a tortfeasor is liable for the aggravation of a pre-existing condition, but is "not liable for any damage or loss [the jury] found was due exclusively to the continuation or increase of any pre-existing disability which is not aggravated by the injury for which the defendants are liable." (citing *Russell v. City of Wildwood*, 428 F.2d 1175 (3d Cir. 1970). Similarly, in *Sauer v. Burlington Northern R.R. Co.*, 106 F.3d 1490, 1495 (10th Cir. 1997), the instruction that the jury was to "reduce the damages by the likeli-

hood that [plaintiff] would eventually have suffered the injury even if the accident had not occurred" was held to be proper since it was supported by expert medical opinions establishing plaintiff's pre-existing medical condition would have worsened notwithstanding the employer's negligence. Hon. Judge Richard Posner, writing for the Seventh Circuit, concluded the same in *Lancaster v. Norfolk and Western Railway Co.*, 773 F.2d 807, 822 (7th Cir. 1985), noting that a FELA defendant may be entitled to an instruction directing the jury to reduce plaintiff's damages to reflect the likelihood, to the extent that it can be shown, that plaintiff would have been disabled by an independent medical condition notwithstanding the defendant's tortious conduct. The Seventh Circuit noted the corollary between the common law tort concepts of the "eggshell skull plaintiff" and the "apportionment principle," stating the latter applies where the plaintiff is highly vulnerable to injury and the damages he suffered must therefore be discounted by the probability . . . that but for the [tortfeasor's conduct] he would have lived a normal life." *Id.* at 822-23.

In this case, there is evidence establishing plaintiff is disabled by medical conditions, such as diabetic neuropathy, independent of Reinauer's tortious conduct. In that event, under common law tort principles plaintiff may not recover full damages, even if the jury finds Reinauer's conduct also contributed to his disability. There is no basis for plaintiff to request a jury instruction which changes the common law rule since the statutory language

applicable in a Jones Act/FELA case, "in whole or in part," and the subsequent judicial gloss, "even in the slightest," do not alter tort principles with respect to plaintiff's obligation to prove the extent of his damages.

In fact, FELA case law relating to apportionment of damages in circumstances where plaintiff suffers a pre-existing condition which is aggravated by his employer's negligence, is persuasive. In *Stevens v. Bangor and Aroostook Railroad Co.*, 97 F.3d. 594 (1st Cir. 1996), the First Circuit reinforced the principle that when a defendant's negligence merely aggravates a FELA plaintiff's pre-existing condition, the defendant is liable only for increased injury caused by its negligence, not for pain and impairment that the plaintiff would have suffered even if the accident had never occurred. Moreover, the First Circuit held in *Quinones-Pacheco v. American Airlines*, 979 F.2d 1, 6-7 (1992), "if post-accident health problems have an impact on a plaintiff's ability to work or on his life expectancy and arise independently of the accident, defendant is entitled to adduce evidence of such problems in an effort to reduce a potential damages award." The Sixth Circuit held in a FELA case, *Harris v. Illinois Central R.R.*, 58 F.3d 1140 (6th Cir. 1995), that plaintiff's estate could not recover for any period of lost earnings related to defendant's tortious conduct *if* plaintiff had become unable to work *at all* as a result of a heart attack unrelated to his workplace accident. The same result was reached by the Fifth Circuit in *Dixon v. International Harvester Co.*, 754 F.2d 573, 588-90 (5th Cir. 1985), wherein the court

held it would be error to allow the jury to consider plaintiff's potential earnings as a railroad worker beyond the point in time when his heart condition would have rendered him unable to perform such work, even if he had not been injured at work.

The United States Supreme Court recently reaffirmed that absent express language to the contrary in the statute, the elements of a FELA/Jones Act claim are determined by reference to common law tort concepts. *See Norfolk Southern Ry. Co. v. Sorrell,* 549 U.S. 158 (2007). Thus in light of expert testimony establishing Brown is disabled by conditions unrelated to Reinauer's conduct, he may not recover full damages, even if the jury finds the accident also contributed to his disability. Instead, the jury must be instructed that Reinauer is only liable to the extent its conduct caused plaintiff's disability.

Dated: July 1, 2008

By: /s/_____
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Supreme Court, U.S.
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No. 10-56

IN THE

Supreme Court of the United States

REINAUER TRANSPORTATION COMPANIES, LLC *et al.*,

Petitioners,

v

GEORGE BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court should accept Petitioners' invitation to use this case as a vehicle to overturn *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957), *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957), and every one of the federal circuits, and hold that FELA and Jones Act plaintiffs must prove causation under the principles of traditional common law proximate cause rather than under the relaxed standard acknowledged by this Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), where

(a) Petitioners never objected to Respondent's invocation of the *Rogers/Ferguson/Gottshall* relaxed standard of causation on his motion for summary judgment, and conceded in the New York Appellate Division that this relaxed standard governed the liability issues in this case;

(b) at the trial on damages only, the critical issue was not common law proximate cause, but instead whether Respondent suffered, as he claimed, from reflex sympathetic dystrophy (RSD) resulting from his accident and ensuing surgeries, or, as Petitioners claimed, from pre-existing medical conditions for which they bore no responsibility;

(c) Petitioners' requested jury instructions on causation were clearly erroneous in

that they would have imposed on Respondent the burden to prove not only that Petitioners' negligence caused RSD but also that his pain and disability did not result from any other condition, in contravention of the FELA / Jones Act rule, acknowledged even by Justice Souter concurring in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), that Petitioners are liable for an injury with multiple cognizable causes so long as the injury resulted "in whole or in part" from their negligence;

(d) Petitioners never raised Judge Souter's Sorrell concurrence either in the trial court or in the Appellate Division, and in the Appellate Division attacked the jury instructions not on the proximate cause grounds advanced in their petition for certiorari, but only on the ground that there was no charge on apportionment of damages; and

(e) as the New York Appellate Division correctly held, Petitioners failed to preserve for review its claim of error with regard to apportionment of damages.

2. Whether Petitioners have presented compelling reasons to reexamine the longstanding and nearly universal consensus, articulated by this Court over 50 years ago in *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957) and *Ferguson v.*

Moore-McCormack Lines, Inc., 352 U.S. 521 (1957), and more recently acknowledged in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), that the FELA and Jones Act establish a relaxed standard of causation, where

(a) the federal circuits have all adopted a relaxed standard and rejected the use of traditional formulations of proximate cause in FELA and Jones Act cases;

(b) the purported conflict among a few lower courts is not meaningful and does not require attention from this Court; and

(c) under the principles of *stare decisis*, Congress' longstanding acquiescence in the courts' construction of the FELA and Jones Act as establishing a relaxed standard of causation militates heavily in favor of respecting this now well-established authority and against adopting a common law standard of proximate cause in FELA and Jones Act cases.

3. Whether Petitioners have presented compelling reasons for this Court to review the New York Appellate Division's holding that Petitioners were correctly found negligent *per se*, pursuant to *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958) and its progeny, for violating Coast Guard regulation 46 CFR 42.15-75(d), which requires that "[s]atisfactory means (in the form of guard rails, life

lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel", where

(a) Respondent's maritime expert made a highly detailed demonstration that a fixed rung ladder with a dangerous *de facto* handrail which broke off in Respondent's hand, causing him to fall and sustain injury, did not provide satisfactory means for seamen to descend from the deckhouse roof of Petitioners' barge;

(b) the New York courts correctly recognized, contrary to Petitioners' assertion, that Respondent's expert did not opine that ANSI standards governing fixed ladders were legally binding or that Petitioners were negligent *per se* because they had violated ANSI standards;

(c) Petitioners never argued in the trial court that Section 42.15-75(d) was insufficiently specific to support a finding of negligence *per se*; and

(d) in opposition to Respondent's showing, Petitioners' expert proffered without so much as a scintilla of supporting evidence only his bare, conclusory one-sentence "say so" that the instrumentality was "suitable for its intended purpose."

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STATEMENT OF THE CASE

Respondent seaman George Brown worked for the Reinauer Transportation Companies for over 30 years. From 1978 on, he was a barge captain, and from 1992 captained barges carrying over 6 million gallons of petroleum. In 1999 and 2000, he and his crew received Reinauer's "Mariner's Award" for excellence in safety and compliance, performance, communication, maintenance of the deck and engine, and crew capability. He loved working on the ocean, never missed a day of work, and had an excellent work record.

On July 21, 2003, Brown sustained serious personal injuries when he fell 8 - 10 feet as he attempted to descend a fixed rung ladder from the deckhouse roof of Reinauer's barge RTC 502. His fall was precipitated by the breaking of the ladder's *de facto* handrail – a pole located within the rungs of the ladder and extending above the level of the roof. Suing under the Jones Act, 46 U.S.C. § 688, Brown established Reinauer's negligence *pe se* and his entitlement to summary judgment on liability via a highly detailed demonstration by his maritime expert, David Cole, that the ladder and appurtenant *de facto* handrail were defective in multiple respects and violated Coast Guard regulation 46 CFR 42.15-75(d). In summary, Mr. Cole demonstrated that:

> The fixed ladder attached to the deckhouse bulkhead did not provide satisfactory means for the protection of the crew in getting to and from the deckhouse roof in the necessary work of

> the RTC 502. Ascending and especially descending the ladder was awkward and unsafe because the grab bar did not extend to a sufficient height above the deckhouse roof, and the top rung of the ladder was too far below the edge of the roof. In addition, there was an unsafe *de facto* handrail running inside the ladder rungs on the right side of the ladder and extending above the deckhouse roof. This *de facto* handrail, consisting of a beige pipe into the top of which was fitted a black pole that formerly held an antenna, constituted a trap, for (a) the black pole was readily accessible and available to be used as a handhold, but (b) this *de facto* handrail was unsafe in that (i) the means by which the black pole was connected into the beige pipe was not sufficiently secure, and (ii) the connecting parts of the *de facto* handrail were negligently maintained and in a corroded state at the time of the accident.

(App. 60a-61a)

On the issue of causation, Reinauer *never objected* to Brown's contention, based on *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500 (1957) and its progeny, that the Jones Act established a relaxed standard of causation, and that he need only demonstrate that Reinauer's "negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (R. 1094-95a,

1098a-1107a). Indeed, *Reinauer expressly conceded on appeal that this relaxed standard was applicable to the determination of its liability under the Jones Act.* (Appellate Division Brief, p. 76)

The case went to trial on damages only. Brown contended that in consequence of his fall and ensuing six (6) surgeries, he developed reflex sympathetic dystrophy (RSD); that he has suffered years of excruciating pain; that he will continue for the rest of his life to suffer this pain, only partially ameliorated by narcotic medication and a spinal cord stimulator implanted in his buttocks; and that he is permanently and totally disabled. Reinauer contended that Brown's pain and disability resulted not from RSD but from other medical conditions including a claimed pre-existing peripheral neuropathy allegedly caused by alcohol abuse or diabetes. (Pet. 11-12, 33)

Reinauer sought jury instructions on causation which would have (a) eliminated any reference to Jones Act statutory language making it responsible for injury "resulting in whole *or in part*" from its negligence, and (b) imposed on Brown the burden to prove not only that his pain and disability was caused by RSD resulting from Reinauer's negligence, but also that such pain and disability was not caused by any other condition, including the alleged pre-existing peripheral neuropathy. (Pet. 12 n.5, 15; App. 170a, 176a) Reinauer's proposed jury instructions on causation were erroneous on multiple counts.

First, Reinauer's proposed instructions were inconsistent with the longstanding and nearly universal view, articulated by this Court over 50 years

ago in *Rogers*, more recently acknowledged in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), and adopted by all of the federal courts of appeal, that the FELA and Jones Act establish a relaxed standard of causation pursuant to which Jones Act defendants are liable for injury "resulting in whole *or in part*" from their negligence.

Second, the requested instructions were inconsistent even with the narrower interpretation of *Rogers* advanced by former Justice David Souter, concurring in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007). Under this view, *Rogers* did not determine whether common law proximate cause is required by the FELA, but held that FELA defendants are liable for an injury with multiple cognizable causes so long as the injury resulted "in whole *or in part*" from their negligence. The present case falls squarely under this heading: as the Petition acknowledges, the critical issue framed by the parties at trial was not proximate cause, but whether Brown's pain and disability was caused by RSD resulting from his fall and ensuing surgeries, or from pre-existing peripheral neuropathy. (Pet. 11-12, 33)

Third, the requested instructions contravened the law on apportionment of damages, pursuant to which (a) it is the defendant's burden to prove that the plaintiff had a pre-existing condition as well as the extent of the damages that any pre-existing condition would inevitably have caused, and (b) if the jury is unable to separate the pain and disability caused by the pre-existing condition, then it should be instructed to hold the defendant liable for all of plaintiff's injuries.

After a hard fought jury trial of three weeks' duration on damages only, the jury awarded Brown approximately $1.1 million dollars for loss of earnings, $400,000 dollars for future medical expenses, and $3.5 million dollars for pain and suffering. The judgment was unanimously affirmed on appeal, and the New York Court of Appeals denied leave to appeal.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR REEXAMINING THE QUESTION OF THE PROPER STANDARD OF CAUSATION UNDER THE FELA AND JONES ACT

A. The Jones Act

"Under the Jones Act, seamen are afforded rights parallel to those of railway employees under the Federal Employers' Liability Act ("FELA"). 46 U.S.C. § 688. Section 51 of the FELA provides, in pertinent part, that '[e]very common carrier by railroad ... shall be liable in damages ... for such injury or death *resulting in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier.' 45 U.S.C. § 51...." *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997). Therefore, under the Jones Act, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957) (quoting *Rogers*, 352 U.S. at 506).

B. Petitioners Conceded In State Court That A Relaxed Standard Of Causation Governed The Liability Issues In This Case

Moving for summary judgment on Petitioners' liability under the Jones Act, Respondent explicitly argued that the Jones Act established a relaxed burden of proof on the issue of causation:

> "The Jones Act carries with it a substantially relaxed quantum of proof required to establish causation. That is, *plaintiff need only demonstrate that defendant's 'negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523 ... (1957)..."

(R. 1094a) Petitioners *never objected* to the application of this relaxed standard of causation. (R. 1098a-1107a) On appeal, they *expressly conceded* that it was applicable to the determination of liability issues, acknowledging that the statutory provision making FELA / Jones Act defendants liable for "injury or death *resulting in whole or in part* from" their negligence meant that Petitioners could be held liable "for risks that would otherwise be too remote to support liability at common law." (Appellate Division Brief, p. 76)

Thus, Petitioners have failed to preserve for this Court's review any question concerning the standard of causation for liability under the Jones Act.

C. At The Trial On Damages Only, The Critical Issue Was Not Proximate Cause, But Instead Which Of Multiple Cognizable Causes – RSD Resulting From The Accident And Ensuing Surgeries Or Alleged Pre-Existing Medical Conditions – Was The Cause Of Respondent's Pain And Disability

Petitioners seeks to raise in this Court the question whether the Jones Act imposes on injured seamen the burden of establishing proximate cause in accordance with traditional common law principles. However, the trial in this case was on damages only, and, as Petitioners acknowledge, the critical issue was not proximate cause, but rather, which of multiple alleged medical conditions was the cause of Respondent's pain and disability: RSD resulting from his accident and ensuing surgeries, as Respondent claimed, or pre-existing medical conditions including peripheral neuropathy allegedly resulting from alcohol abuse or diabetes, as Petitioners claimed. (Pet. 11-12, 33) In this context, Petitioners sought a jury instruction on causation phrased in the following terms:

> To award any damages for an injury consequence, including damages for economic loss and pain and suffering, you must find that there is a direct and unbroken chain of causation between the injury and the consequence alleged, including RSD, exists [sic] and was caused by hip injury or hip surgery other than for the removal of a lipoma.

> *But you must also determine that his pain and disability, if he has any, is not the result of any other condition, such as peripheral neuropathy caused by alcohol abuse or diabetes; or by inappropriate use of narcotic pain medications.*

(Pet. 12 n.5, 15; App. 170a, 181a) This proposed instruction was clearly erroneous, and no claim of error may be predicated on the trial court's refusal to give it.

D. Petitioners' Requested Jury Instructions On Causation Were Flatly Inconsistent With The FELA And Jones Act, Even As Construed By The Concurring Justices In *Norfolk Southern Railway Co. v. Sorrell*

Petitioners' application for certiorari is predicated on Justice Souter's concurrence in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), which they never so much as mentioned in the trial court or in the New York Appellate Division. However, their proposed jury instructions on causation were flatly inconsistent not only with the nearly universal consensus of the courts that the FELA and Jones Act establish a relaxed standard of causation (*See*, Point II), but even with Justice Souter's narrower reading of *Rogers*' holding with respect to the statutory "in whole or in part" language. Therefore, under longstanding New York jurisprudence, no claim of error may be predicated on the trial court's refusal to give Petitioners' seriously

flawed instructions. *See, Hunt v. Bankers and Shippers Ins. Co. of New York*, 50 N.Y.2d 938, 409 N.E.2d 928 (N.Y. 1980); *Hamilton v. Eno*, 81 N.Y. 116, 1880 WL 12460 (N.Y. 1880).

1. *Rogers v. Missouri Pacific Railway Co.* Squarely Rejects The Notion Of Proximate Cause Embodied In Petitioners' Requested Jury Instructions

In *Rogers*, this Court rejected the application in FELA cases (and therefore in Jones Act cases) of the notion of proximate cause embodied in Petitioners' requested jury instructions.

The *Rogers* Court castigated the court below for deciding that:

> *there is no jury question in actions under [FELA], although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected*, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant.

Id. at 505 (emphasis added). Holding as error this notion that FELA/Jones Act plaintiffs are required to affirmatively exclude "causes with which the defendant was not connected" – which is precisely

what Petitioners were demanding of Respondent here – the *Rodgers* Court wrote:

> That is not the governing principle defining the proof which requires a submission to the jury in these cases. The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that "the injury would not have occurred but for the negligence" of his employer, and that "[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred." That is the language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury.
>
> *Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes,* including the employee's contributory negligence.... The statute expressly imposes liability upon the employer to pay damages for

> injury or death due "in whole or in part" to its negligence.

Id., 505-507 (emphasis added).

2. Justice Souter's *Sorrell* Concurrence

In his *Sorrell* concurrence, Justice Souter agreed that the *Rogers* Court had "instructed courts how to proceed when there are multiple cognizable causes of an injury." *Norfolk Southern Railway Co. v. Sorrell*, *supra*, 549 U.S. at 173. He wrote:

> We granted certiorari in *Rogers* to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes. 352 U.S. at 501, 506... We rejected Missouri's "language of proximate causation which ma[de] a jury question [about a defendant's liability] dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* at 506.... *Recovery under the statute is possible, we said, even when an employer's contribution to injury was slight in relation to all other legally cognizable causes.*

Id. at 174-175 (emphasis added).

3. Petitioners' Proposed Jury Instructions On Causation Were Plainly Erroneous, And Hence No Claim Of Error May Be Predicated On The Trial Court's Refusal To Give Them

Petitioners' requested jury instructions on causation contravened basic FELA/Jones Act principles articulated by this Court in *Rogers*, and acknowledged even by Justice Souter in his *Sorrell* concurrence. Petitioners complain (Pet. 12 n.5, 15) that the trial court refused proposed jury instructions that would have required Respondent to prove not only that there was a causal relationship between his fall or ensuing hip surgery and his claimed RSD, but also that "his pain and disability, if he has any, is not the result of any other condition, such as peripheral neuropathy caused by alcohol abuse or diabetes; or by inappropriate use of narcotic pain medications." (App. 170a, 181a) However, those proposed instructions (1) erroneously eliminated all reference to the statutory language making Petitioners responsible for "injury or death *resulting in whole or in part* from" their negligence, and (2) erroneously required Respondent to prove not only that Petitioners' negligence caused RSD, but also that his pain and disability did not result from any other "causes with which the defendant was not connected" in plain contravention of the holding of *Rodgers* even as narrowly construed by Justice Souter.

The rule of law in New York is that "it is not error for the court to refuse to charge any request unless such request is in all respects correct. The

court is not called upon to dissect a request, eliminating that which is not sound and charging the remainder, nor is it bound to make changes in a request, but it should take the request as a whole, and charge it if it is correct, and, if not, refuse to charge it; and, if the request as a whole is not correct, no error can be predicated from the refusal of the court to charge it." *Cobb v. Metropolitan St. Ry. Co.*, 56 A.D. 187, 67 N.Y.S. 644, 646 (1st Dept. 1900) (citing *Hamilton v. Eno*, 81 N.Y. 116, 127, 1880 WL 12460 at *7 (N.Y. 1880). *See, Dooling v. City of New York*, 148 A.D. 713, 132 N.Y.S. 1012, 1014 (2d Dept. 1912).[1]

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[1] Petitioners allege (Pet. 13, 33) that Respondent's trial counsel exploited what it contends was an erroneous charge on causation when he argued in summation that "George was in pain and that's all you have to decide." Not so. As Respondent's counsel also noted, both parties had framed the case in those terms, and Petitioners' counsel acknowledged that this was indeed "the critical issue in the case." (App. 126a)

Dr. Sidney Bender, Respondent's neurological expert, testified at trial that Respondent's positive response to lumbar sympathetic blocks and to the spinal stimulator was diagnostic of RSD. (R 747, 1851-52, 1859-60, 1864) Under questioning by Petitioners' counsel, he acknowledged that the critical question was the genuineness of Respondent's complaints of pain:

> Q Now, you realize, of course, that the critical question is to what extent, if at all, the pain complaints are genuine, right?
>
> A Yes. (R. 747)

Petitioners' neurological expert, Dr. Samuel Rapaport, opined that Respondent was suffering from an alcoholic or diabetic neuropathy, or from another medical condition called meralgia paresthetica. However, he concurred that the critical question was the genuineness of Respondent's complaints of pain:

> Q So if the jury does believe at the end of this case that he has got pain, big league pain in his thigh, it's not from meralgia paresthetica, correct?
>
> A Correct.
>
> Q It's not from alcoholic neuropathy, correct?
>
> A Right.
>
> Q And it's not from diabetic neuropathy, correct?
>
> A Correct.
>
> Q It's from something else, right?
>
> A Right. (R 2095-96)

So the jury would not miss the import of this testimony, Petitioners' counsel summed up the point in the very last question before the case went to the jury:

> Would you agree in this case, Doctor, as was said by Doctor Bender, the critical issue is whether or not George Brown has the complaints of pain he claims? (R 2096)

E. Petitioners Did Not Appeal On The Proximate Cause Grounds Advanced In Its Petition For Certiorari, But Instead On The Ground That There Was No Instruction On Apportionment Of Damages, Concerning Which The New York Appellate Division Correctly Held That Petitioners Had Failed To Preserve Its Claim Of Error For Review

On appeal to New York's Appellate Division, Petitioners never raised the proximate cause arguments presented in its petition for certiorari. Its attack on the trial court's jury instructions was addressed instead to the absence of a charge on *apportionment of damages*. (Appellate Division Brief, Point III, pp. 73-79) Petitioners cited *Rogers* for the principle that "once reasonable minds might conclude that the employer's negligence was even slightly related to the injury complained of, a jury case has been made out, and this conclusion is not altered by the fact that damages may be reduced by the fact that the damages were caused by other factors, including contributory negligence." It then argued:

> "Courts have consistently held, based upon the rationale of *Rogers, supra*, that FELA and Jones Act defendants are liable solely for the damages they cause, and to the extent other causes combine to disable a plaintiff, that *apportionment of damages is required.*"

(*Id.*, p. 76) Thus, apportionment, not proximate cause, was the nub of Petitioners' appeal. Petitioners' representation to this Court that it "did not appeal from the failure of the trial court to charge the jury on apportionment" (Pet. 34-35, n. 12) is simply false.

Also false is Petitioners' representation that "it did not seek an apportionment charge" (*Id.*): the documents in Petitioners' own Appendix show plainly that it did. (App. 176a ["Damages – Pre-Existing Injuries"]; 186a-191a) However, the requested apportionment charge was erroneous, as it would incorrectly have placed the burden of proof on Respondent.

The burden of proof on apportionment of damages was squarely on Petitioners. In *Maurer v. United States*, 668 F.2d 98 (2d Cir. 1981), an action by a seaman under the Public Vessels Act for injuries resulting from an unseaworthy shipboard condition, the Second Circuit held:

> ...[W]hen a plaintiff is incapacitated or disabled prior to an accident, the defendant is liable only for the additional harm or aggravation that he caused. [cit.om.] Second, when a plaintiff has a preexisting condition that would inevitably worsen, a defendant causing subsequent injury is entitled to have the plaintiff's damages discounted to reflect the proportion of damages that would have been suffered even in the absence of the subsequent injury, but *the burden of proof in such cases is upon the*

> *defendant to prove the extent of the damages that the preexisting condition would inevitably have caused.*

Maurer, 668 F.2d at 100 (emphasis added). In *Ahlf v. CSX Transportation, Inc.*, 386 F.Supp.2d 83 (N.D.N.Y. 2005), an FELA case, the court similarly held:

> *Defendant has the burden of proving that Plaintiff had a pre-existing condition. See Maurer v. United States ...; Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 603 (1st Cir. 1996). *As a result, if the jury was unable to separate the pain and disability caused by the preexisting condition, then the jury should be instructed to hold Defendant liable for all of Plaintiff's injuries.*

Ahlf, 386 F.Supp. 2d at 91 (emphasis added). In *Stevens v. Bangor & Aroostook R.R. Co.* – the very case Petitioners relied on (App. 190a) -- the First Circuit held that in light of FELA's broad remedial purposes (a consideration equally applicable to the Jones Act), "if the factfinder cannot separate injuries caused or exacerbated by the accident from those resulting from a pre-existing condition, the defendant is liable for all such injuries." *See, Stevens*, 97 F.3d at 601-603.

Respondent proffered an apportionment charge which correctly placed the burden of proof where it belonged – on Petitioners. (App. 166a-167a) Evidently unwilling to shoulder its burden,

Petitioners would not accept this charge and never excepted to the resulting absence of an apportionment charge. (App. 120a-123a, 146a-147a) Under the circumstances, the New York Appellate Division correctly held that Petitioners "failed to preserve their current argument now advanced before us that Supreme Court erred in declining to give *any* charge on the issue of apportionment, without regard to the burden of proof (*see Hunt v Bankers & Shippers Ins. Co. of N.Y.*, 50 NY2d 938, 940 [1980]...)." (App. 20a)

F. Conclusion

In view of the foregoing, the case at bar is plainly not an appropriate vehicle for reexamining the question of the standard of causation under the Jones Act, wherefore the petition for certiorari should be denied.

II. PETITIONERS HAVE NOT PRESENTED COMPELLING REASONS TO REEXAMINE THE LONGSTANDING AND NEARLY UNIVERSAL CONSENSUS OF THE COURTS THAT THE FELA AND JONES ACT ESTABLISH A RELAXED STANDARD OF CAUSATION

It is and for decades has been settled law that the FELA and Jones Act displaced traditional common law formulations of proximate cause and established a substantially relaxed standard of causation: a seaman, like Respondent, may recover when his employer's negligence played "any part, even the slightest, in producing the injury or death for which damages are sought." The rule derives from

this Court's construction of the statutorily-imposed liability for injury "resulting in whole or in part" from an employer's negligence in FELA and Jones Act cases. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957) (FELA); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957) (Jones Act). It is firmly ensconced in subsequent decisions of this Court and in the decisions of every federal circuit court of appeals.

In a newly minted argument, never ventured at trial or in the Appellate Division, Petitioners builds a house of cards on the suggestion of Justice Souter, *concurring* in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), that this longstanding bedrock rule of Jones Act / FELA causation may have been based on a misunderstanding of what this Court meant in *Rogers*. As shown below, Petitioners have not presented compelling reasons to reexamine the nearly universal consensus of the courts that the FELA and Jones Act establish a relaxed standard of causation.

A. Supreme Court Decisions

In decisions spanning five decades, this Court has interpreted Congress' language in the FELA and Jones Act as having displaced traditional common law formulations of proximate cause and established a relaxed standard on the issue of causation.

In *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), this Court rejected the state court's "distinctions between 'proximate cause' in the legal sense, deemed a sufficient cause to impose liability,

and 'cause' in the 'philosophical sense,' deemed insufficient to impose liability" under the FELA. *Id.* at 523.

> The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purposes. The statute declares that railroads shall be responsible for their employees' deaths "resulting in whole or in part" from defective appliances such as were here maintained.

Id. at 524.

In *Rogers*, this Court rejected the application in FELA cases of the "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury", and held:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the

> employee's contributory negligence.... The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.

Id., 352 U.S. at 505-507.

In *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164 (1969), this Court, in determining whether the defense of contributory negligence was available to a railroad sued by a non-employee, observed that an FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act." *Id.* at 166.

Finally, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court, in addressing the question whether recovery for intentional infliction of emotion distress is available under the FELA, broadly interpreted its holding in *Rogers*:

> We have liberally construed FELA to further Congress' remedial goal. For example, we held in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500.. (1957), that a relaxed standard of causation applies under FELA.

Id. at 542.

In *Norfolk Southern Railway Co. v. Sorrell*, *supra*, and very recently in *Norfolk Southern*

Railway Co. v. Jordan, –U.S.–, 130 S.Ct. 2094 (Apr. 19, 2010), this Court declined to reexamine the question of the proper standard of causation under the FELA. Concurring in *Sorrell*, Justice Ginsburg observed that this standard "is long settled, we have no cause to reexamine it." *Id.*, 549 U.S. at 177. Upon a review of the authorities cited above, she concluded that "*Rogers* describes the test for proximate causation applicable in FELA suits. That test is whether 'employer negligence played any part, even the slightest, in producing injury or death for which damages are sought.'" *Id.*

B. The Federal Circuits All Interpret The FELA And Jones Act As Having Displaced Traditional Formulations Of Proximate Cause And Established A Relaxed Burden Of Proof On Causation

In *McBride v. CSX Transportation, Inc.*, 598 F.3d 388 (7th Cir. 2010), the Seventh Circuit conducted an exhaustive review and analysis of the authority bearing on the question of causation in FELA cases, concluding that "traditional formulations of proximate cause have no role in FELA cases", and that "[t]he idea that *Rogers* relaxed the proximate cause requirement has been echoed by every other court of appeals." *Id.* at 398-400. While there is some disagreement on the precise meaning of *Rogers*, all of the federal courts of appeal read *Rogers* as making, in effect, the same broad statement that this Court made in *Gottshall*, to wit, that "a relaxed standard of causation applies under FELA." 512 U.S. at 542.

1. First Circuit

In *Toucet v. Maritime Overseas Corp.*, 991 F.2d 5 (1st Cir. 1993), the First Circuit held:

> A plaintiff's burden of proving causation under the Jones Act is "featherweight." [cit.om.] Liability exists if the employer's negligence contributed even in the slightest to the plaintiff's injury.

Id., at 10. The First Circuit has approved a Jones Act jury instruction phrased in essentially the same terms used by the trial court here:

> Under the law the defendant's negligence is a legal cause of any injury or damage if that negligence played *any part, no matter how small,* in bringing about or causing the injury or damage. Therefore, even if the defendant's negligence operated *in combination with the act of another or in combination with some other cause,* the defendant's negligence is a legal cause of the plaintiff's injury or damage if it played any part no matter how small in bringing about or causing the injury or damage.

Hopkins v. Jordan Marine, Inc., 271 F.3d 1, 4 (1st Cir. 2001). See also, *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987).

2. Second Circuit

The Second Circuit has repeatedly held that the relaxed standard of causation articulated in *Rogers* – i.e., that the plaintiff need prove only that his employer's negligence played *any part, even the slightest, in producing the injury* for which damages are sought – is applicable to FELA and Jones Act cases. *See, Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 n.8 (2d Cir. 2004) ("The Jones Act incorporated FELA by reference. Under both statutes, the plaintiff bears a reduced burden of proof with respect to causation."); *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999); *Nicholson v. Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) (under the FELA, "negligence need not be the proximate cause of the injury. The FELA has its own rule of causation. The injury need only be one 'resulting in whole or in part' from the negligence).

In *DeLima v. Trinidad Corporation*, 302 F.2d 585 (2d Cir. 1962), the Second Circuit squarely held that a Jones Act plaintiff was entitled to have the jury instructed on the element of causation in accordance with *Rogers*, and reversed a defendant's verdict because the trial court had charged instead in proximate cause language akin to that requested by Petitioners in this case. The *DeLima* Court wrote:

> Plaintiff also asserts the trial court's denial of his requested charge on proximate cause as to his Jones Act claim was error. *Plaintiff requested the court to charge that if the employer's negligence 'played any part, even the*

> *slightest, in producing an injury to plaintiff, the plaintiff may recover.***' The Court, however, gave the traditional common law instruction that 'Proximate cause is that cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of, and without which it would not have occurred.'* Since the language of the requested charge was taken directly form *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506 ..., a decision which reflects the Supreme Court's view that the Federal Employers' Liability Act, 45 U.S.C. 51 et seq. and the Jones Act are departures from traditional common law principles, we believe the requested charge should have been given. See also *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 ...

Id. at 587-588 (emphasis added).

3. Third Circuit

The Third Circuit has construed *Rogers* as "recogniz[ing] that the common law notions of proximate cause are not applicable in [FELA] cases". *Ely v. Reading Company*, 424 F.2d 758, 762 (3d Cir. 1970). It accordingly held, in *Hoyt v. Central Railroad*, 243 F.2d 840 (3d Cir. 1957), that it was reversible error to charge the jury, in language akin to that requested by the defendants here, that it was the plaintiff's burden to prove proximate cause in the

sense of the "direct cause, that which produces a result without any interfering or intervening cause." *Id.* at 843. *See, Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991).

4. Fourth Circuit

The Fourth Circuit, in *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432 (4th Cir. 1999), held that "to prevail on a Jones Act negligence claim against his employer, a seaman must establish...causation to the extent that his employer's negligence was the cause "in whole or in part" of his injury...[T]o further the remedial goals of the FELA, and derivatively the Jones Act, the Supreme Court has relaxed the standard of causation by imposing employer liability whenever "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." [quoting *Gottshall*, 512 U.S. at 543]. *Id.* at 436. *See, Brown v. Baltimore & Ohio R.R. Co.*, 805 F.2d 1133, 1137 (4th Cir. 1986).

5. Fifth/Eleventh Circuit

In *Page v. St. Louis Southwestern Railway Company*, 312 F.2d 84 (5th Cir. 1963), the Fifth Circuit held that it is error to instruct the jury as Petitioners requested here in the traditional language of common law proximate cause:

> *Under the definition of proximate cause in this case, the jury was required to find, before the plaintiff could prevail, that the cause of his injury was one*

> *which in natural and continuous sequence produced the event or happening in question and without which such event or happening would not have occurred.* A detailed consideration of those requirements would seem to indicate that they are not essential to the jury's conclusion in this case that employer negligence played a part in producing the plaintiff's injury. The same thing would appear to be true of the requirement that the accident be the natural and probable consequence of defendant's act or omission and such a consequence as ought to have been foreseen by a person in the exercise of ordinary care in the light of attending circumstances. *Those requirements may well have been injurious to the plaintiff. They are foreign to the simple test prescribed in Rogers, supra. Under that decision, and the long line of Supreme Court cases which have followed it, we must hold that the court's instructions on proximate causation were erroneous in operating to unduly restrict the jury in the exercise of its functions.*

Id. at 92 (emphasis added). *See, Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997)(*Rogers* used term "slightest" to "describe the reduced standard of causation between the employer's negligence and the employee's injury" in FELA cases); *Thibodeaux v. Tex. E. Transmission Corp.*, 548 F.2d 581, 587 n. 12 (5th Cir. 1977).

6. Sixth Circuit

In *Hausrath v. New York Central R.R. Company*, 401 F.2d 634 (6th Cir. 1968), the Sixth Circuit reversed a defendant's verdict in an FELA case where the jury had been charged that the plaintiff had to prove that the defendant's negligence was "the direct and proximate cause" of his sickness. *Id.*, at 636, 638. The Court wrote:

> The proceeding currently under review, however, is brought under *a federal statute [FELA] wherein Congress deliberately adopted a negligence standard different from that of the common law. The phrase "resulting in whole or part" was obviously designed to make even more explicit that negligence of an employer did not have to be the sole cause or "the proximate cause" of the injury in order to justify recovery.*
>
> ...[S]ince Congress has deliberately established a more protective principle for railroad employees than that of the common law, *it is reversible error for a judicial charge to fail to employ and emphasize both the "in whole or in part" causal language of the statute and the interpretive language of the Supreme Court in the Rogers case.*

Id. at 637, 638 (emphasis added). See, *Richards v. Consolidated Rail Corp.*, 330 F.3d 428, 433-434 (6th Cir. 2003).

7. Seventh Circuit

In *McBride v. CSX Transportation, Inc.*, *supra*, the Seventh Circuit reaffirmed its longstanding view that common law proximate causation is not required to establish liability under the FELA, and held that the jury was properly instructed in the language of this Court's words in *Rogers*. *Id.*, 598 F.3d at 406. *See, Holbrook v. Norfolk Southern Railway Co.*, 414 F.3d 739, 741-742 (7th Cir. 2005); *Lisek v. Norfolk & Western Railway Co.*, 30 F.3d 823, 831-832 (7th Cir. 1994); *Eglsaer v. Scandrett*, 151 F.2d 562, 565-566 (7th Cir. 1945).

8. Eighth Circuit

The Eighth Circuit, in *Fletcher v. Union Pacific R.R. Co.*, 621 F.2d 902 (8th Cir. 1980), *cert. denied*, 449 U.S. 1110 (1981), held that "[t]he test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury which is the subject of the suit." *Id.* at 909. *See, Nordgren v. Burlington N. R.R. Co.*, 101 F.3d 1246, 1249 (8th Cir. 1996).

9. Ninth Circuit

In *Oglesby v. Southern Pacific Transportation Co.*, 6 F.3d 603 (9th Cir. 1993), the Court held that "it was not prejudicial error for the court to refuse to instruct the jury that the [] violation was the

proximate or direct cause of the injury. This holding is consistent with the case law of several other circuits which have found [that] "proximate cause" is not required to establish causation under the FELA." *Id.* at 609. *See, Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1363-64 (9th Cir. 1995); *Ellison v. Shell Oil Co.*,882 F.2d 349, 353 (9th Cir. 1989); *Taylor v. Burlington N. R.R.*, 787 F.2d 1309, 1313 (9th Cir. 1986).

10. Tenth Circuit

The Tenth Circuit, in *Summers v. Missouri Pacific Railroad System*, 132 F.3d 599 (10th Cir. 1997), observed that this Court in *Rogers* had "definitively abandoned" proximate cause analysis under the FELA, and that "several circuits have held that it is reversible error for a district court to instruct the jury in a FELA case as to causation using traditional common law concepts rather than the standard imposed by the statute." *Id.*, at 606, 607. It held that:

> A jury instruction containing both the statutory language and the explanatory language of *Rogers* is certainly the clearest articulation of the appropriate causation standard and presents the preferable approach in the future.

Id., at 607.

C. The Purported Conflict Among A Few State Courts Is Not Meaningful

In *McBride v. CSX Transportation, Inc.*, *supra*, the Seventh Circuit reviewed the state caselaw that Petitioners here cite as evidence of a split in authority over the standard of causation in FELA / Jones Act cases, and concluded to the contrary that several of those states [i.e., Iowa, Minnesota, Ohio and Nebraska] "do not require FELA plaintiffs to establish 'proximate cause,' that is a 'direct relation between the injury asserted and the injurious conduct alleged.'" *Id.*, 598 F.3d at 404 n.7.

Most of the cases which supposedly insist on "proximate cause" cite *Rogers* as the standard by which "proximate cause" is measured. In *Snipes v. Chicago & Pacific Railroad Co.*, 484 N.W.2d 162, 164-165 (Iowa 1992), the court stated that an FELA plaintiff must prove that "the negligence proximately caused, *in whole or in part*, the accident," and, quoted *Rogers'* "even the slightest" language to show "[t]he liberality with which the Supreme Court has applied this test." In Minnesota, Ohio and Nebraska, appellate cases relying on *Rogers* likewise hold that FELA claims are subject to a less stringent causation requirement than common-law claims. *See, Hager v. Norfolk & W. Ry. Co.*, 2006 WL 3634373 at *5 (Ohio App., Dec. 14, 2006); *Crafton v. Union Pac. R. Co.*, 585 N.W.2d 115, 123 (Neb.App. 1998) ("The common-law standard of proximate cause is not applicable to FELA."); *Narusiewicz v. Burlington N.R. Co.*, 391 N.W.2d 895, 898-899 (Minn.App. 1986). The Montana and West Virginia cases, like *Snipes*, *supra*, characterize the FELA causation requirement not as

traditional proximate cause but as proximate cause "*in whole or in part*" – a concept which, as noted above, was omitted entirely from Petitioners' requested jury instructions on causation. *Marazzato v. Burlington N.R. Co.*, 817 P.2d 672, 675 (Mont. 1991); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W.Va. 1997) (expressly declaring that *Rogers* "established" "[t]he causation standard in FELA cases"). In any event, in neither *Marazzato* nor *Gardner* was causation the issue: *Marazzato* turned on foreseeability (*Id.*), and *Gardner* turned on negligence (*Id.* at 501).

In *Raab v. Utah Ry. Co.*, 221 P.3d 219 (Utah 2009), the court adopted Justice Souter's *Sorrell* concurrence, but what it said it was rejecting was not a relaxed standard of causation, but the notion that only "but for" causation is required. *Id.* at 228-230 ¶¶ 32, 35, 37. Moreover, the court applied what can only be described as a relaxed standard of causation. In *Raab*, a defective brake forced replacement of the lead locomotive, which required plaintiff to enter a trailing locomotive to set controls, where he hit his head on a low hanging air conditioner. The court held that the jury was entitled to find that the defective brake was "a proximate cause" of plaintiff's injury. *Id.* at 231. Finally, the *Raab* court's definition of the FELA standard of causation is technically *dicta*: since the plaintiff's evidence was deemed sufficient to establish "proximate cause," it was unnecessary for the court, in resolving the issue before it, to decide whether FELA in fact requires traditional proximate cause or establishes a more relaxed standard of causation. Regardless of which standard applies, the

defendant's motion for summary judgment had to be denied.

There is, in short, not disagreement but essential unanimity. The standard by which causation is measured in FELA / Jones Act cases is, compared with traditional common law proximate cause, a relaxed standard. Petitioners have presented no basis for this Court to conclude that any differences in emphasis or phraseology in the opinions have resulted in divergent outcomes, administrability problems, unfairly disparate results in different forums, or any other adverse consequences.[2] In short, neither *Sorrell* nor any of Petitioners' caselaw warrants this Court's reexamining and overturning longstanding FELA / Jones Act jurisprudence on causation.

---

[2] Petitioners' other cases are inapposite. *Mosley v. Cia. Mar. Adra, S.A.*, 314 F.2d 223 (2d Cir. 1963) concerns the *unseaworthiness* of the vessel or its appliances under general maritime law, and is no authority on the standard of causation in Jones Act cases. *Id.* at 227-228. *Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir. 1987) similarly concerns a claim (against a manufacturer) under general maritime law, not under the Jones Act. *Id.* at 537-540. *Wharf v. Burlington N. R.R.*, 60 F.3d 631 (9th Cir. 1995) does not address proximate cause, but rather which of multiple possible causes was the cause of the plaintiff's loss of earnings. *Id.* at 639. The issue in *Baker v. Baltimore & O.R. Co.*, 502 F.2d 638 (6th Cir. 1974) was mitigation of damages, *id.* at 644, as to which the defendant, not plaintiff, bears the burden of proof. *See, Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593-594 (6th Cir. 1986).

D. Congress' Longstanding Acquiescence In The Courts' Interpretation Of The FELA And Jones Act As Establishing A Relaxed Standard Of Causation Militates Heavily In Favor Of Respecting This Now Well Established Authority Under The Principles Of *Stare Decisis* And Against Adopting A Common Law Formulation Of Proximate Cause

This Court has recognized that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Pearson v. Callahan*, –U.S.–, 129 S.Ct. 808, 816-817 (2009) (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)). In the wake of *Rogers* and circuit law which has uniformly interpreted the FELA and Jones Act as having established a relaxed standard of causation, Congress has not seen fit to amend these statutes to clarify or correct the standard of causation applied by the courts almost universally for several decades. Accordingly, the principles of *stare decisis* militate heavily in favor of respecting this now well-established authority and against adopting a common law formulation of proximate cause in FELA and Jones Act cases. *See, McBride v. CSX Transportation, Inc.*, 598 F.3d 388, 406 (7th Cir. 2010).

III. RESPONDENT'S MARITIME EXPERT PROPERLY CONSIDERED THE SAFETY CONSIDERATIONS UNDERLYING THE ANSI A14.3 STANDARD PERTAINING TO FIXED LADDERS IN OPINING THAT PETITIONERS VIOLATED COAST GUARD REGULATION 46 CFR 42.15-75(d)

An employer's violation of a Coast Guard regulation enacted for the safety of seamen constitutes negligence *per se* under the Jones Act. *Kernan v. American Dredging Co.*, 355 U.S. 426, 430-431, 439 (1958). Courts faced with the issue have uniformly held that a shipowner's violation of Coast Guard Regulation 46 CFR 42.15-75(d) is a valid predicate for a finding of negligence *per se* under the Jones Act. *See, Wuestewald v. Foss Maritime Company*, 319 F.Supp.2d 1002, 1008 (N.D. Cal. 2004); *Pilare v. Matson Navigation Company*, 2006 WL 3533030 at *2 (N.D. Cal. 2006).

Respondent's maritime expert, David Cole, made a detailed demonstration that Petitioners violated Section 42.15-75(d), entitled "Protection of the crew", which provides:

> Satisfactory means (in the form of guard rails, life lines, gangways or underdeck passages, etc.) shall be provided for the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel.

Mr. Cole's affidavit demonstrated that:

> The fixed ladder attached to the deckhouse bulkhead did not provide satisfactory means for the protection of the crew in getting to and from the deckhouse roof in the necessary work of the RTC 502. Ascending and especially descending the ladder was awkward and unsafe because the grab bar did not extend to a sufficient height above the deckhouse roof, and the top rung of the ladder was too far below the edge of the roof. In addition, there was an unsafe *de facto* handrail running inside the ladder rungs on the right side of the ladder and extending above the deckhouse roof. This *de facto* handrail, consisting of a beige pipe into the top of which was fitted a black pole that formerly held an antenna, constituted a trap, for (a) the black pole was readily accessible and available to be used as a handhold, but (b) this *de facto* handrail was unsafe in that (i) the means by which the black pole was connected into the beige pipe was not sufficiently secure, and (ii) the connecting parts of the *de facto* handrail were negligently maintained and in a corroded state at the time of the accident.

(App. 60a-61a)

Petitioners erroneously asserts that Mr. Cole opined that Petitioners were negligent *per se* for violating the ANSI A14.3 standard for fixed ladders. Instead of addressing the opinion actually proffered by Mr. Cole, Petitioners attack a straw man of their own devising. Contrary to Petitioners' suggestion, Mr. Cole *never* ventured the opinion that ANSI A14.3 was legally binding or that Petitioners w negligent *per se* for violating ANSI standards. (App. 65a-72a, 104a-110a) Mr. Cole relied on the *safety concerns underlying the cited ANSI requirements* and made an *unrefuted* demonstration that:

(A) ANSI A14.3 is "authoritative with regard to proper and safe design of fixed ladders."

(B) *"The safety concerns underlying the cited ANSI requirements are fully applicable, and are if anything exacerbated, in the marine context present here.* Since the RTC 502 operates on the open sea, seamen ascending and descending the deckhouse ladder are potentially subject to destabilizing forces created by the motion of the sea, and also to the effects of inclement weather, and therefore to an enhanced risk of loss of balance and falling."

(C) The stated purpose of ANSI A14.3 is "to provide safety for life, limb, and property by establishing *minimum*

standards for the design and installation of fixed ladders."

(D) There was not just a technical violation of the cited ANSI requirements pertaining to handrails/grab bars and ladder rungs. The height of the horizontal grab bar affixed to the RTC 502's deckhouse roof was *so substantially below* the ANSI requirement (*Id.*, 68a), and the distance of the top rung of the ladder below the level of the roof was *so substantially greater* than allowed by ANSI A14.3 (*Id.*, 69a), that the *deckhouse ladder failed of its fundamental purpose of providing a safe and convenient means of mounting the ladder so as to descend from the deckhouse roof to the main deck of the barge.*

(E) On account of the ladders deficiencies, *seamen were forced to employ an awkward and unsafe procedure* in descending from the deckhouse roof to the main deck of the barge.

(F) To avoid this, it was "perfectly natural and indeed practically inevitable that seamen would regard the beige support pipe/black pole structure running vertically inside the rungs of the ladder" – near where a proper handrail or vertical grab bar would have been located – as *a de facto handrail.*

> However, for the very reason that it was so readily available and accessible as a handhold, *the antenna pole structure "constituted a trap, since the means by which the black pole was connected into the beige pipe was not sufficiently secure, and the connecting parts of this de facto handrail were negligently maintained and in a corroded state at the time of the accident."*
>
> (G) Under these circumstances, ANSI A14.3 is "*relevant to a determination under* 46 CFR 42.15-75(d) whether the fixed ladder in question here provided 'satisfactory means ... for the protection of the crew' in getting to and from the deckhouse roof."

(App. 66a, 69a-71a, 108a-110a)

Thus, as New York Supreme Court correctly observed, Mr. Cole "did not opine that the ANSI standards were legally binding", but properly considered the safety considerations underlying ANSI A14.3 as "a factual predicate for his opinion." (App. 31a) The New York Appellate Division likewise correctly observed, "Cole did not opine that defendants were negligent per se because they violated ANSI requirements; rather, he stated that the ANSI guidelines are relevant to his determination of whether the ladder provided 'satisfactory means' of access within the meaning of 46 CFR 42.15-75(d)." (App. 14a n.4) In response, as Supreme Court again correctly observed, Petitioners' expert ventured "a

bare, conclusory opinion that the ladder was suitable for its purpose", without a scintilla of supporting evidence, and "does not even mention" the existence or failure of the pole that Mr. Cole demonstrated to be the deckhouse ladder's *de facto* handrail. (App. 32a, 82a)

Petitioners' further claim that 46 CFR 42.15-75(d) is insufficiently specific to support a finding of negligence *per se* is an afterthought, never raised in response to the Respondent's motion for summary judgment and hence unpreserved for review. That is hardly surprising, as the caselaw uniformly holds that a violation of Section 42.15-75(d) may support a finding of negligence *per se* under the Jones Act. *See, Wuestewald v. Foss Maritime Company, supra*, 319 F.Supp.2d at 1008; *Pilare v. Matson Navigation Company, supra*, 2006 WL 3533030 at *2-4.

To be sure, very general regulations which, boiled down, say nothing more than "be safe" and "avoid hazards", may not support a finding of negligence *per se* under the Jones Act. *See, e.g., Wilson v. Maersk Line, Limited*, 2007 WL 3085436 at *2 (S.D.N.Y., Oct. 18, 2007) (safety management system must "[p]rovide for safe practices in vessel operation and a safe work environment onboard..."). In contrast with the regulation in *Wilson*, 46 CFR 42.15-75(d) (a) governs a specific situation, i.e., "the protection of the crew in getting to and from their quarters, the machinery space and all other parts used in the necessary work of the vessel"; and (b) prescribes with ample particularity the means required for such protection, i.e., "[s]atisfactory means (in the form of guard rails, life lines, gangways

or underdeck passages, etc.)". Petitioners' quarrel with the regulatory term "satisfactory" is misplaced. In *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514 (9th Cir. 1996), for example, the Court held the defendant negligent *per se* based on its violation of a comparable regulation, 46 CFR 28.215, employing the analogous term "suitable", which required that "suitable hand covers ... must be installed in way of machinery which can cause injury to personnel." *Id.*, at 516-517.

The shipowner's failure to provide *any* instrumentality for the protection of the crew as required by Section 42.15-75(d) would incontestably amount to the violation of a clear and specific regulatory command; that, in essence, is what *Wuestewald, supra*, holds. *Id.*, 319 F.Supp.2d at 1008. It is no less a violation of the clear and specific command of Section 42.15-75(d) where, as here, a *defective instrumentality fails* and causes injury. That is precisely what Respondent's expert demonstrated in this case.

In sum, the New York courts' finding that Petitioners violated 46 CFR 42.15-75(d) and were negligent *per se* was eminently correct. This Court's review is unwarranted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

REINAUER TRANSPORTATION COMPANIES, LLC,
REINAUER TRANSPORTATION COMPANIES, LP,
REINAUER COMPANIES, INC., REINAUER MARITIME COMPANY,
LLC AND REINAUER MANAGEMENT COMPANY, INC.,

Petitioners,

v.

GEORGE BROWN,

Respondent.

On Petition For A Writ of Certiorari to the Court of Appeals of New York

REPLY BRIEF FOR PETITIONERS

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PETITIONER'S REPLY BRIEF

In the petition for certiorari, Reinauer Transportation Companies, LLC ("Reinauer"), demonstrated a split of authority among the lower courts over whether a departure from the proximate cause standard is authorized by FELA/Jones Act which creates uncertainty for litigants and encourages forum shopping, making this issue suitable at this time for consideration by this Court. Reinauer also established that the Court in *Norfolk Southern Railway Co. v. Sorrell*, in declining to resolve this issue on which certiorari had not be granted, noted that the issue of the substantive content of the causation standard is indeed significant that it merits this Court's consideration when fully briefed in the appropriate case. (549 U.S. 158, 164 (2007)) Resolution by this Court of the issues presented by Reinauer's petition, i.e., (1) whether the language "in whole or in part" of the FELA and Jones Act eliminated the common law requirement that a plaintiff prove proximate cause so that damages are to be awarded in FELA/Jones Act cases brought pursuant to a relaxed "even the slightest" standard which is not set forth in the language of the statute, and (2) whether admittedly inapplicable ANSI standards may be substituted for what was promulgated by the U.S. Coast Guard resulting in a finding of negligence *per se* and dismissal of the defense of contributory negligence without any evidence or finding that a U.S. Coast Guard requirement was violated, is necessary so uniformity in the application of the federal statutory law embod-

ied under the FELA/Jones Act can be restored. *See Morange v. States Marine Lines*, 398 U.S. 375, 402 (1970) ("Federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country'").

Respondent George Brown's ("Brown") opposition to the petition disregards the split of authority among the lower courts over whether a departure from the proximate cause standard is authorized by the statute and, in an attempt to justify the result in this case, posits the notion that the "in whole or in part" language of FELA, incorporated into the Jones Act, has been interpreted by this Court to mean that an employer is liable to an employee if its negligence was *even the slightest* cause of the *damages* claimed by the employee. Respondent also asserts the instant case is not a proper vehicle for this Court to resolve whether *Rogers*[1] has been incorrectly interpreted as holding the statutory language "in whole or in part" abrogated the common law requirement of proximate cause because the issue at trial was proof of *damages*. But this case perfectly illustrates the enormity of the problem associated with *any* departure from the common law requirement of proximate cause and, as a result, is an appropriate vehicle for the Court to consider the substantive question of whether FELA and the Jones Act embody the proximate cause standard as to causation and damages.

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[1] *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957).

A. THE OBJECTED-TO JURY CHARGE, IN RELIANCE ON *ROGERS*, EMBODIED THE INCORRECT STANDARD

Over Reinauer's objection (Pet. App. 117a-118a, 170a-171a, 188a-189a) the trial court gave a jury instruction that erroneously employed the same "even the slightest language" that sharply divided this Court in *Sorrell*. *See Sorrell*, 549 U.S. 158, 172-77 (Souter, J, concurring), *id.* at 178 (Ginsburg, J, concurring). Compounding the problem, the instruction applied to plaintiff's burden of *proving damages* since Reinauer's liability had already been decided by the court on the basis of inapplicable ANSI standards. The lower Court's erroneous and objected-to instruction at the damages-only trial relieved Brown of his burden under the Jones Act of proving that Reinauer's negligence was the proximate cause of his damages by requiring Brown to prove nothing more than that Reinauer's negligence was a "slight" cause, in combination with other causes including naturally occurring conditions, of Brown's damages. Pet. App. 138a-140a. In the courts below, as well as in its Petition for Certiorari, Reinauer argued the "in whole or in part" language of the FELA/Jones Act was erroneously invoked to reduce Brown's common law burden of proving proximate cause with respect to *damages*—the only issue relevant at the damages-only trial conducted in this case. The trial court, having accepted Respondent's jury instruction based on an erroneous reading of *Rogers*, refused to instruct the jury that Brown had the burden of

proving Reinauer's negligence proximately caused his damages. Pet. App. 119a. The court also rejected Reinauer's proposed jury instruction which would have required Brown to prove his damages were proximately caused by Reinauer's negligence, i.e. upon a jury finding that there existed "a direct and unbroken chain of causation between the injury and the consequences alleged." Pet. App. 170a-171a.

B. THE QUESTION OF WHETHER PROXIMATE CAUSE IS THE PROPER STANDARD UNDER THE FELA/JONES ACT IS EQUALLY PROBLEMATIC CONCERNING LIABILITY OR DAMAGES

While it is clear that in the instant case, as well as others, the disputed interpretation of *Rogers* as eliminating the common law requirement of proximate cause has been applied to the issue of damages, this does not in any meaningful way undermine the importance of reviewing the proper meaning of the phrase "in whole or in part" and whether *Rogers* has been properly read as holding that this phrase abrogated the common law requirement of proximate cause—either for proving liability or damages. Indeed, that *Rogers* has been erroneously interpreted as eliminating the common law element of proximate cause as to both liability *and damages* surely does not diminish the need for review and a clear statement by the Court as to the meaning of the phrase "in whole or in part" in FELA and Jones Act law suits in the light of an

obvious split of authority on these issues, which affect important industries and are recurring. On the contrary, Reinauer's petition, and Brown's opposition which states not only that *Rogers* reduced a FELA/Jones Act plaintiff's burden of proving causation, but also reduced his burden of proving damages, demonstrate the heightened need for review by this Court. Further, the rationale as to why the interpretation of *Rogers* as eliminating the common law requirement of proximate cause is erroneous is precisely the same whether applied to the issues of liability or damages. As a result, Respondent's assertion that this case is not a proper vehicle for resolving whether *Rogers* has been incorrectly interpreted as reducing the common law requirement of proximate cause is not meaningful.

C. RESPONDENT'S OPPOSITION TO THE PETITION IS BASED ON THE INCORRECT NOTION THAT *ROGERS* REDUCED PLAINTIFF'S BURDEN OF PROVING DAMAGES

Respondent argues that the standard for proving damages in FELA/Jones Act cases, based upon the phrase "in whole or in part" as purportedly held in *Rogers*, is whether the employer's negligence was "even the slightest" cause of the damages, expressly arguing, as the Appellate Division, Third Department held, that "[R]ogers . . . rejected the application in FELA cases (and therefore in Jones Act cases) of the notion of proximate cause embod-

ied in Petitioner's requested jury instructions."[2] *Opp. p. 9-10.* Respondent concedes this was what was charged to the jury at trial, over Reinauer's repeated objections that said standard was error in that it eliminated the proximate cause requirement for proof of recoverable damages, and was not embodied in the FELA/Jones Act.[3] Accordingly,

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[2] Petitioner notes Respondent's Brief in Opposition ("Opp.") is internally inconsistent with respect to the allegation that Reinauer failed to raise and/or properly preserve the issue of whether the FELA/Jones Act eliminated the common law requirement that damages be proven by the proximate cause standard. While claiming Reinauer did not object to the jury instructions "on proximate cause grounds" Respondent argues "[R]ogers rejected the application in FELA (and therefore in Jones Act cases) of the notion of *proximate cause embodied in Petitioner's requested jury instructions,*" (Opp. p. 9) thereby conceding Reinauer in fact objected to the jury instructions on proximate cause grounds.

[3] Reinauer consistently argued to the trial court, and on appeal to the Appellate Division, that error was committed because the jury was instructed, in reliance upon *Rogers*, that damages could be awarded if Reinauer's negligence was "even the slightest cause" since proof of proximate cause of damages was required. Pet. App. 117a-118a, 146a-147a, 170a-171a, 188a-189a. Indeed, as Reinauer argued and proposed in its jury instructions, which were rejected by the trial court, damages could only be awarded if proven proximately. Defendant requested this proximate cause instruction: "For an injury to be the cause of an alleged consequence there must be an unbroken chain of connection between the consequence and the injuries which you find plaintiff actually sustained. You are not to award damages for any injury or condition from which plaintiff may have suffered, or may now be suffering, unless it has been established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question." Pet. App. 170a-

while Respondent claims, for a variety of equally flawed reasons, that this case does not properly bring up for review the issue of whether the phrase "in whole or in part" and the interpretation given by some courts to the decision in *Rogers* served to reduce the common law standard with respect to causation of damages, there is no question that this issue was the predominate issue at the damages-only trial, and properly preserved for appellate review.[4] Indeed, since the sole issue presented at trial was whether Reinauer's negligence caused Brown's reflex sympathetic dystrophy or not, the erroneous legal standard imposed by the trial court based upon its improper reading of *Rogers* was determinative of the outcome of trial and thus the Court's error eliminating the proximate cause requirement was harmful to Reinauer.

Respondent's opposition, in fact, crystallizes Reinauer's argument that the erroneous interpretation of *Rogers* as eliminating the common law

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171a. These proposed instructions were correct and tracked well-established caselaw. *See Blier v. United States Lines Co.*, 286 F.2d 920, 925 (2d Cir.1961)("The proper charge in a Jones Act case with respect to proof of damages was '. . . whether the . . . negligence was a *proximate cause of injury*'. To be a proximate cause there must be a direct causal connection between the negligence and the injury."); *see also Mosley v. Cia. Mar. Adra, S. A.*, 314 F.2d 223, 228 (2d Cir. 1963).

[4] Respondent fails to address in its opposition the fact that Reinauer's repeated objections to the erroneous jury instructions (Pet. App. 117a-118a, 146a-147a, 170a-171a, 188a-189a) appropriately preserved the issue for review pursuant to the Civil Practice Law and Rules of the State of New York. *See* CPLR §§ 4110-b; 4017 and § 5501(3)(A).

requirement of proximate cause as to liability has been further extended and applied by courts to the issue of proof of liability for damages, as occurred in the instant case.[5] *See, e.g., Marchica v Long Island R.R.*, 31 F.3d 1197 (2d Cir. 1994) ("[I]n the FELA context the traditional concept of proximate cause is supplanted by the less stringent standard that there be some causal relation, no matter how slight, between the injury and the [employer]'s breach of duty.)[6] It is respectfully urged that the petition demonstrates deep division over the effect

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[5] Respondent asserts Reinauer is barred from challenging the "even in the slightest" standard because it did not make that challenge in its appeal from the motion court's grant of summary judgment on the issue of negligence *per se* for alleged violation of 46 CFR § 42.15-75(d). This is incorrect since Brown's fall from the deckhouse roof of Reinauer's vessel clearly resulted in "injury" (as opposed to damages) with respect to the discrete issue raised in the summary judgment motion, i.e., liability for allegedly violating the Coast Guard regulation. Reinauer was not, however, precluded from correctly arguing at the damages-only trial (as it did) that Brown had to prove his damages were proximately caused by Reinauer's negligence and having argued that at trial, is not barred from raising that issue on appeal, which naturally brings up the substantive content of the causation standard

[6] *Cf., Wharf v. Burlington N. R.R.*, 60 F.3d 631, 639 (9th Cir. Wash. 1995) (Plaintiff in FELA case must prove damages were proximately caused by defendant's negligence); *Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 540 (5th Cir. La. 1987)(In Jones Act case, only proximately caused damages may be awarded); *Baker v. Baltimore & O. R. Co.*, 502 F.2d 638, 644 (6th Cir. Ohio 1974); *Dale v. Baltimore & Ohio Railroad Company*, 552 A.2d 1037, 1041-1042 (1989) ("The decision in *Rogers v. Missouri P.R. Co., 'relates to liability, and not, implicitly, to damages.'*")

of *Rogers* since the courts below in this case, as well as other courts, have not only interpreted that decision as eliminating the common law requirement of proximate cause with respect to liability, but have extended it to eliminate the requirement that an employee establish the employer's negligence proximately caused the damages sought.

D. RESPONDENT INCORRECTLY CLAIMS REINAUER'S OBJECTION TO THE JURY INSTRUCTIONS WAS ON THE ISSUE OF APPORTIONMENT OF DAMAGES

Respondent's assertion that Reinauer's objections to the jury charge went to the issue of apportionment, as opposed to proximate cause, is flatly incorrect. As discussed in the Petition for Certiorari at pp. 35 and 35 (fn. 12), apportionment of damages was not the issue at trial. Reinauer sought to establish Brown did not suffer reflex sympathetic dystrophy ("RSD") as a result of the accident or ensuing treatment and that condition was not the cause of his alleged disabling pain symptoms, while Brown sought to establish that he did develop RSD as a result of the accident and/or treatment rendered thereafter, which was disabling. Reinauer's evidence established that polyneuropathy, which was independent of RSD and which was brought on by either diabetes or alcohol abuse unaffected by the accident, could explain Brown's pain symptoms and also precluded a medical diagnosis of RSD, which is a diagnosis of exclu-

sion. No argument was presented at trial that pre-existing conditions were aggravated by the accident or combined with traumatically caused conditions to disable Brown. To the extent case law discussing apportionment was cited in briefs to the trial court and/or Appellate Division, it was exclusively to persuade the courts that "even the slightest" was not the applicable law of damages in FELA/Jones Act cases since in addition to requiring proof of proximately caused damages, courts have repeatedly held that in cases brought pursuant to the FELA/Jones Act, an employer is not responsible in damages for unrelated conditions. The trial court, rejecting Reinauer's proposed instructions, erroneously charged the jury not only was Reinauer liable for damages if its negligence was "even the slightest" cause, but also to the extent its negligence "operate[d] in combination with . . . some natural cause" in producing Brown's damages. Pet. App. 138a-140a.

While Reinauer argued to the courts below that its liability instruction—given at a damages-only trial—erroneously eliminated the proximate cause requirement, it also tried to provide context by reference to apportionment case law intended to instruct the trial court that the FELA/Jones Act did nothing to eliminate the common law principle that an employer could only be held liable for damages it proximately caused. Further, the proposed instructions provided by Reinauer were in all aspects correct: it is well established that under FELA plaintiff has the burden of establishing the

proportion of damages caused by the accident, as opposed to other unrelated conditions. *See Shupe v. New York Cent. System*, 339 F.2d 998, 999 (7th Cir. 1965); Prosser, Law of Torts, § 45, n. 229 (2d ed. 1955).

E. FELA/JONES ACT JURISPRUDENCE INSTRUCTS THAT SUBSTANTIVE ELEMENTS OF AN EMPLOYEE'S CLAIM ARE GOVERNED BY REFERENCE TO COMMON LAW, UNLESS EXPRESSLY ABROGATED IN THE STATUTE

Respondent's opposition fails to address Petitioner's arguments establishing the substantive elements of FELA/Jones Act claims are determined "by reference to the common law" unless the statute contains "express language to the contrary" (*Norfolk Southern Railway Co. v. Sorrell* (549 U.S. 158, 165-66 (2007)) and that in enacting FELA, Congress expressly altered the common law only to the extent that it ". . . abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, and prohibited employers from exempting themselves from FELA through contract . . ." (*Conrail v. Gottshall*, 512 U.S. 532, 543 (U.S. 1994); *Sorrell*, 549 U.S. at 168) but did not eliminate the requirement that an employee prove the employer's negligence proximately caused the injury and damages. Further, in relying on *Rogers* in support of the claim that this Court has interpreted the FELA as

eliminating the requirement of proximate cause of liability and damages, Respondent includes the language from *Rogers* which makes plain the limits of its reach: "*the test of a jury case* [in an FELA case] is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506; Opp. p. 5 (emphasis added). Respondent does not in any way attempt to challenge the fact that in *Rogers* the jury was instructed it *must find* proximate cause in order to hold defendant liable (352 U.S. at 520, 523 (1957)), and that the Court referred to its prior decisions recognizing that FELA requires the defendant's negligence must have been a "contributory proximate cause" in order for plaintiff to recover. *Id.* at 506, n.11 (citing *Coray v. S. Pac. Co.*, 335 U.S. 520, 523 (1949)); *id.* at 507, n.13 (citing *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 435 (1949)). Indeed, Brown offers no substantive response to the petition to the extent it establishes *Rogers* did not hold that FELA eliminated the common law element of proximate cause with respect to either liability or damages. Pet. pp. 26-33. In simplest terms, Respondent fails to provide any substantive or otherwise meaningful defense of his claim that *Rogers* must be read as having eliminated the common law requirement that plaintiff prove defendant's negligence proximately caused damages.

Respondent claims that Reinauer has not presented compelling reasons for review of the issue

presented by the Court, arguing that there is "nearly universal consensus of the courts that the FELA and Jones Act establish a relaxed standard of causation" and conflict between federal courts and state courts on this issue "[i]s not meaningful." Opp. pp. 19, 31. The assertion that *Rogers* has universally been read as eliminating the requirement of proximate cause in FELA/Jones Act cases contradicts the concurring opinion in *Sorrell* of Justice Souter, in which he was joined by Justices Scalia and Alito, recognizing that "[r]ecently, some courts have taken the view that Rogers smuggled proximate cause out of the concept of defendant liability under FELA",[7] while "several State Supreme Courts have explicitly or implicitly espoused the opposite view."[8] In addition to the cases cited in Justice Souter's concurring opinion, the fact that three justices of the Court expressed the opinion that *Rogers* did not eliminate the element of proximate cause undermines Respondent's claim of "nearly universal consensus."[9] Respondent also glosses over the

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[7] Citing *Holbrook v. Norfolk Southern. R. Co.*, 414 F.3d 739, 741-742 (7th Cir. 2005); *Summers v. Missouri Pacific R. Co.*, 132 F.3d 599, 606-607 (10th Cir. 1997); *Oglesby v. Southern Pacific Transp. Co.*, 6 F.3d 603, 606-609 (9th Cir. 1993).

[8] Citing *Marazzato v. Burlington No. R. Co.*, 817 P.2d 672, 674-675 (1991); *Gardner v. CSX Transp., Inc.* 498 S.E.2d 473, 483 (1997); *Snipes v. Chicago Central & Pacific R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992); *Chapman v. Union P. Railroad*, 467 N.W.2d 388, 395 (1991).

[9] The "split of authority regarding the Supreme Court's use of the phrase 'even the slightest' in *Rogers*" was also expressly acknowledged in *Jordan v. Burlington N. Santa Fe*

fact that following *Sorrell* at least two district courts have found the reasoning articulated by Justice Souter compelling and have held proximate cause remains an element in FELA cases. *See Lafferty v. Norfolk S. Ry. Co.*, 2009 U.S. Dist. LEXIS 106442, 10-11 (N.D. Ohio Nov. 12, 2009) and *Jarrett v. CSX Transp. Inc.*, 208 U.S. Dist. LEXIS 86256 (N.D. Ohio September 10, 2008). Respondent also incorrectly describes as "dicta" the holding of the Supreme Court of Utah in *Raab v. Utah Ry. Co.*, 221 P.3d 219 (Utah 2009) that ". . .reading *Rogers*' ambiguous language as eliminating the proximate cause requirement would be contrary to the Supreme Court's approach in FELA" and ignores the fact that other state courts have expressed confusion on the issue. *See, e.g., McNeel v. Union Pac. R.R.*, 276 Neb. 143, 150 (Neb. 2008); *Hall v. Norfolk S. Ry. Co.*, 2007 U.S. Dist. LEXIS 69630 (N.D.Ga. Sept. 18, 2007); *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 634 (Tenn. 2009); *In re Global Sante Fe Corp.*, 275 S.W.3d 477 (Tex. 2008). Respondent does not, however, dispute that the federal statutes embodied in the FELA and Jones Act are to be applied uniformly in state courts (*See Urie v. Thompson*, 337 U.S. 163, 174 (1949)), making his assertion that there is no compelling reason to review this issue which is the subject of dispute between justices of the Court, as well as numerous state and federal courts, appear disingenuous.

R.R. Co., 2009 Tenn. App. LEXIS 8, 46-48 (Tenn. Ct. App. Jan. 15, 2009); *cert denied* ___ U.S. ___, 130 S. Ct. 2094, 2010 U.S. LEXIS 3472 (U.S., Apr. 19, 2010).

F. ANSI STANDARDS WERE IMPERMISSIBLY USED TO FIND A VIOLATION OF 46 CFR 42.15-75(d)

Respondent does not dispute that ANSI standards may not serve as a basis for a finding of negligence *per se*, but claims his liability expert, David Cole, did not premise his opinion that 46 CFR 42.15-75(d) was violated upon the expert's determination that ANSI standard A14.3 was violated and only used the ANSI standard as "a factual predicate for his opinion" that the regulation was violated. This is, quite simply, a distinction without a difference. That Cole used as "a factual predicate for his opinion" the standards set forth in ANSI A14.3 and that the motion court, despite Reinauer's objection that ANSI could not serve as a basis for a statutory or regulatory violation since not enacted or adopted by a governmental entity, accepted Cole's opinion in total had the inescapable effect of holding Reinauer liable on a theory of negligence *per se*, with the further result that the defense of comparative negligence as provided for under the Jones Act was dismissed as a matter of law, although no regulation or statute was shown to have been violated by Reinauer, as opposed to non-binding ANSI standards. By conceding Cole's reliance on ANSI, Respondent further concedes that 46 CFR 42.15-75(d) itself contains no standards or particulars except that "satisfactory means" be provided, and cannot as a result be the basis for a finding of negligence *per se*. But for his reliance upon the inapplicable ANSI standards,

Cole could not have reached the conclusion 46 CFR 42.15-75(d) was violated, and accordingly, all issues of liability were removed from the jury's consideration in this Jones Act law suit based upon the motion Court's application of inapplicable ANSI standards to decide, as a matter of law, Reinauer's liability.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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